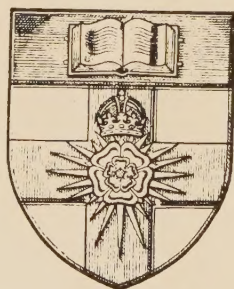


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CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

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*Followed. Re ROSE,
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[1931. C. 209.]

C. A.
1931
MAUGHAM
J.

March 19.

C. A.
May 18, 19.

Will—Specific Bequest of Shares in Limited Company—Subsequent Option granted by Testator to purchase Shares within Month of his Death—Exercise of Option—Conversion—Ademption of Shares.

A testator by his will made in 1911 specifically bequeathed 420 of the preference shares held by him in a company among sundry legatees, and devised and bequeathed the residue of his real and personal estate unto his trustees upon trust to sell the same and to stand possessed of the proceeds of sale upon the trusts therein mentioned. By an agreement in writing dated December 13, 1927, the testator granted to H., in consideration of the payment by him of the sum of 5*l.*, an option, to be exercised within one month of the testator's death, to purchase all the shares held by him in the company. The testator died on January 31, 1930. On February 18, 1930, H. gave notice of his intention to exercise the option to purchase granted to him by the testator. On a summons by the surviving executor and trustee of the will for the determination of the question whether the specific gifts of the shares had been adeemed by the grant by the testator in his lifetime to H. of the option to purchase all his shares in the company, and of the exercise of the option by H. :—

Held (affirming the decision of Maugham J.), that the case was covered by *Lawes v. Bennett* (1785) 1 Cox, 167 and *Weeding v. Weeding* (1861) 1 J. & H. 424; that those cases had been acted upon too long for the Court of Appeal to overrule them; and consequently that the specific gifts of the shares had been adeemed by the exercise of the option.

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By his will dated August 26, 1911, William Edward Carrington appointed executors and trustees thereof and gave to them 200 of his preference shares in S. R. Carrington & Sons, Ltd., upon trust to stand possessed thereof in trust to pay the income thereof to his sister Mary Elizabeth Swithenbank during her life, and after her death in trust for all her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry under that age in equal shares, and if there should be only one such child the whole to be in trust for that child, and if no child of Mary Elizabeth Swithenbank should live to attain a vested interest in the said legacy, upon trust that the same should fall into his residuary estate: and he gave to his niece Dorothy Mary Yates Carrington 150, to Mary Elizabeth Swithenbank 50, and to Freda Morris 20 of his said shares, and after certain specific legacies devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees upon trust to sell the same and to stand possessed of the proceeds of sale upon the trusts therein mentioned.

By a codicil to his will dated April 29, 1921, the testator revoked the appointment of executors and trustees contained in the will and appointed William Ralphs and George William Andrew to be executors and trustees thereof. George William Andrew died on August 15, 1923.

By an agreement in writing dated December 13, 1927, the testator granted to Thomas Hulme, in consideration of the payment by him of the sum of 5*l.*, an option to purchase all the shares held by the testator in S. R. Carrington & Sons, Ltd., on the conditions set out in the agreement. The option was to be exercised within one month after the testator's death.

The testator died on January 31, 1930.

By a letter dated February 18, 1930, and addressed to the personal representatives of the testator, Thomas Hulme gave notice of his intention to exercise the option.

This summons was taken out by William Ralphs, the surviving trustee, for the determination of the question

whether the gifts in the will of (i.) 200 preference shares of 10*l.* each in S. R. Carrington & Sons, Ltd., to the trustees of the will to pay the income thereof to the defendant Mary Elizabeth Swithenbank during her life and after her death in trust for her children as therein mentioned; (ii.) 150 of the said preference shares to the defendant Dorothy Mary Yates Carrington; (iii.) 50 of the said preference shares to the defendant Mary Elizabeth Swithenbank; and (iv.) 20 of the said preference shares to the defendant Freda Morris, had respectively been adeemed by the grant by the testator in his lifetime, namely, on December 13, 1927, of an option to Thomas Hulme to purchase all his shares in the said company, and by the exercise of the option by Thomas Hulme on February 18, 1930.

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B. Ormerod for the plaintiff.

Henry Johnston for specific legatees. The case is clear, apart from *Lawes v. Bennett*. (1) The testator, at the date of the will, owned the shares. Between the date of the will and the date of his death he conferred an equity on Hulme entitling him to call for the shares at par. This created an equitable estate in the shares: *London and South Western Ry. Co. v. Gomm*. (2) If ss. 23 and 24 of the Wills Act, 1837, apply, the property described in the will is not "gone": *Blake v. Blake*. (3) The testator's interest—an absolute interest subject to an equity—passes to the legatees. The case of an out and out contract for sale is distinguishable, for there the testator in equity becomes the trustee only of the shares, and the owner in equity of the purchase money, and there is ademption: *Moor v. Raisbeck* (4); *Farrar v. Earl of Winterton* (5); *In re Clowes* (6); *In re Bick*. (7) In the present case the testator was never a mere trustee of the shares without any beneficial interest and never entitled in equity to the purchase money. There was therefore no

(1) 1 Cox, 167.

(2) (1882) 20 Ch. D. 562, 581.

(3) (1880) 15 Ch. D. 481, 487.

(4) (1841) 12 Sim. 123.

(5) (1842) 5 Beav. 1.

(6) [1893] 1 Ch. 214.

(7) [1920] 1 Ch. 488.

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ademption. There is no conversion until the option has been exercised. [He referred to *Townley v. Bedwell* (1); *Drant v. Vause* (2); *Emuss v. Smith* (3); *Collingwood v. Row* (4); *Weeding v. Weeding* (5); *Edwards v. West* (6); *In re Isaacs* (7); *In re Pyle* (8); *In re Dyson* (9); *In re Marlay*. (10)] It was not until *In re Marlay* (10) that it was definitely settled that conversion does not relate back to the contract. [He referred to *Watts v. Watts* (11) and *In re Bancroft*. (12)]

F. R. Evershed for other specific legatees. The case can be decided on the ground that, according to the authority of text-books, the rule in *Lawes v. Bennett* (13) is an anomaly, and ought not to be extended. [He referred to Jarman on Wills, 7th ed., vol. ii., p. 712; *Edwards v. West* (6); *In re Isaacs* (7); *In re Swan*. (14)] If *In re Marlay* (10) properly states the effect of *Lawes v. Bennett* (13) the devisee does enjoy the benefits of the property until the option is exercised. It is unnecessary in the present case to come to the conclusion reached in *In re Pearce* (15), on the ground that the offer would have to be revocable. Here there was no binding contract for sale at the date of the testator's death. The doctrine on which *Lawes v. Bennett* (13) is founded is not really applicable to a case of personal estate.

C. E. R. Abbott for two residuary legatees. There is no case which suggests that *Lawes v. Bennett* (13) and *Weeding v. Weeding* (5) are no longer binding. The principle of ademption applies to the present case. [He referred to Theobald on Wills, 8th ed., p. 176; *Harrison v. Jackson* (16); Jarman on Wills, 7th ed., vol. i., p. 385; and *Watts v. Watts*. (11)] There is nothing in any text-book which throws doubt upon the authority of *Weeding v. Weeding*. (5)

(1) (1808) 14 Ves. 590.

(2) (1842) 1 Y. & C. C. C. 580.

(3) (1848) 2 De G. & Sm. 722, 734.

(4) (1857) 26 L. J. (Ch.) 649.

(5) 1 J. & H. 424.

(6) (1878) 7 Ch. D. 858.

(7) [1894] 3 Ch. 506.

(8) [1895] 1 Ch. 724.

(9) [1910] 1 Ch. 750.

(10) [1915] 2 Ch. 264.

(11) (1873) L. R. 17 Eq. 217.

(12) [1928] Ch. 577.

(13) 1 Cox, 167.

(14) [1915] 1 Ch. 829.

(15) (1894) 8 R. 805.

(16) (1877) 7 Ch. D. 339.

Heyworth for other residuary legatees. The granting of the option must have adeemed the bequest: *Watts v. Watts* (1); *In re Pearce*. (2)

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MAUGHAM J. [having stated the facts:] The question, apparently a simple one, is whether the specific legacies are wholly void as having been adeemed by the option or its exercise. The case gives rise to two questions entirely distinct from each other, first, whether there has been a conversion by events after the testator's death, and secondly, whether, as a result of events after the date of the will, the specific bequests have been adeemed. These two questions ought to be kept separate.

In the present case there has been no conversion in the technical sense. At the date of his death, the testator held the shares in question. It is true that Hulme was entitled to give notice, within one month of the testator's death, of his intention to purchase them. But, by s. 24 of the Wills Act, 1837, "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Accordingly, if not bound by authority, I should be inclined to hold that I must construe the specific gift as if the will had been executed immediately before the testator's death: and the result of so holding would be that the testator has given to certain persons preference shares which he had at his death, and that the specific legatees would get the purchase money. Further, s. 23 of the Wills Act, 1837, provides that: "No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." Accordingly, it seems that, in the present case,

(1) L. R. 17 Eq. 217.

(2) 8 R. 805.

C. A. the option given by the testator on December 13, 1927, is
 1931 not to prevent the operation of the will in regard to such
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I have expressed my opinion as to that because I thought it desirable that I should do so. But I must now state that, sitting here, I feel myself bound to follow, on the question of ademption, the decisions of judges of great eminence in cases which I am unable to distinguish from the present case. It seems to me that the matter is one for the Court of Appeal, and it may very well be that the parties interested will take the case to that Court.

The problem arising from the giving of an option after the date of the will was considered in several cases before the passing of the Wills Act, 1837. In *Lawes v. Bennett* (1) Sir Lloyd Kenyon M.R. decided that, as a result of such an option in a lease, the real estate was converted into personal estate, and the proceeds passed to the persons to whom the personal estate had been bequeathed. It may not be irrelevant to point out that in that case the testator had devised all his real estate to his cousin John Bennett, and had given all his personal estate between John Bennett and John Bennett's sister. The question was whether there had been conversion, and, for reasons which seem to have been sufficient before the Wills Act, 1837, Sir Lloyd Kenyon M.R. decided that the option, when exercised, dated back to the date at which it had been given, and that the real estate was converted into personalty and that Bennett and his sister took the proceeds. Various other cases followed that decision, and it was not until the matter came before Wood V.-C. in *Weeding v. Weeding* (2) that there was an authoritative decision after the date of the Wills Act, 1837. In that case the testator made his will in 1855, and devised his "Kentish Town estate" to his trustees upon certain trusts. By an agreement dated February 11, 1856, he agreed to lease a part of his "Kentish Town estate" to one Day, giving him an option to purchase for 2000*l.* before the end of 1859. The

(1) 1 Cox, 167.

(2) 1 J. & H. 424.

testator died in October, 1856. There was some dispute as to the option. Ultimately specific performance of the agreement was decreed, and the sum of 2000*l.* was paid into Court. There was an administration action, and the question arose to whom the 2000*l.* belonged. The case was argued by counsel of great eminence, and there was a reference to s. 24 of the Wills Act, 1837. Wood V.-C. apparently reserved judgment, and said that he was unable to distinguish the case from *Lawes v. Bennett*. (1) He said (2): "I do not see how I can give any weight to the argument of the defendants, unless I can distinguish the present case from *Lawes v. Bennett* (1) and *Townley v. Bedwell*. (3) When a point has been decided by such a judge as Lord Kenyon, and the decision followed by such a judge as Lord Eldon, notwithstanding his admission that much might be said on the other side, I cannot conceive a case more completely bound by authority. Considering by whom the first case was decided, it is scarcely necessary to say, that, though much might be urged against it, still, there is much to be said also in favour of Lord Kenyon's view." Then, after considering the testator's position, he pointed out that (4): "When you find, that, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract without referring in any way to the contract he has entered into, there it is considered that there is sufficient indication of an intention to pass that property to give to the devisee all the interest, whatever it may be, that the testator had in it." And he said later (4): "But the case is very different when, after having given the property by will, the testator makes a sale of it. If it is a sale out and out, there is no question that the devisee's interest is taken away."

Weeding v. Weeding (4) has been constantly followed. But I do not find that it has come before the Court of Appeal in a case of ademption strictly so called. I do find, however,

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(1) 1 Cox, 167.

(2) 1 J. & H. 424, 429.

(3) 14 Ves. 590.

(4) 1 J. & H. 424, 431.

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that in *In re Marlay* (1) the Court of Appeal had to consider and to explain *Lawes v. Bennett*. (2) But the point in *In re Marlay* (1) was conversion and not ademption, and it is clear that all three judges carefully confined their decisions to the question whether there had been a conversion. Lord Cozens-Hardy M.R. said (3): "In *In re Isaacs* (4) the precise point was raised before Chitty J., who held, following *Lawes v. Bennett* (2), that the property was converted not from the date of the contract, but from the date of the exercise of the option. I think the true view is that the devisee has an estate in fee defeasible upon the exercise of the option:" and it was held that there had been no conversion of the testator's estates at the date of his death, but that they passed to the devisee as real estate and did not vest in the executor as such, and that the estate duty was charged on the land itself: and Warrington L.J. observed (5): "The question in this case is as to the incidence of certain estate duty and as to that alone."

It seems to me that the point is still open to the Court of Appeal, but I should be doing wrong if I distinguished this case from *Weeding v. Weeding*. (6) It is true that the shares are personal estate; it is true also that there is this difference, that personal estate cannot be the subject of an estate in fee defeasible upon the exercise of an option. For myself, I accept the view of Sargant J. in *In re Swan* (7) that, in the case of personalty not vested in trustees, the most that can be done is to hold that "the first taker is during his life a trustee or a quasi-trustee for the remaindermen," so that, in the present case, the personal representatives, if at the date of the death they had not been able to hand over the shares at once to the legatees, could be, at the most, only trustees for the people who would become entitled upon the exercise of the option. That distinction is not sufficient to justify me in refusing to follow *Weeding v. Weeding* (6), which has been extended to a case of leaseholds, and the other cases

(1) [1915] 2 Ch. 264.

(4) [1894] 3 Ch. 506.

(2) 1 Cox, 167.

(5) [1915] 2 Ch. 264, 280.

(3) [1915] 2 Ch. 275.

(6) 1 J. & H. 424.

(7) [1915] 1 Ch. 829, 834.

which follow it, and accordingly I am bound to hold that, as a result of the exercise of the option, the gifts of these shares have been adeemed.

K. R. A. H.

Some of the specific legatees appealed. The appeal was heard on May 18 and 19, 1931.

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Henry Johnston for the appellants. *Lawes v. Bennett* (1) was not a case of ademption. The grant of the option preceded the will. The case was decided before the Wills Act. The supposed rule laid down in *Lawes v. Bennett* (1) should not have been applied to any case to which s. 23 of the Wills Act was applicable: *Moor v. Raisbeck*. (2)

Weeding v. Weeding (3) was a case of ademption. Wood V.-C. had not in mind s. 23 of the Wills Act, though s. 24 had been referred to in argument. The proceeds of sale should pass to the donee of the property subject to the option: *In re Bancroft* (4); *In re Isaacs* (5); *In re Marlay*. (6)

Gover K.C. and C. E. R. Abbott for two of the respondent residuary legatees. The decision of Maugham J. is correct: *In re Pyle* (7); *Watts v. Watts*. (8) That anomalous rule in *Lawes v. Bennett* (1), followed, as it was, in *Weeding v. Weeding* (3), though difficult to justify, has been too long established to be overruled now.

Heyworth for other residuary legatees.

Johnston in reply. The reasoning by which ademption is shown to follow from an out and out contract for sale is wholly inapplicable to the mere grant of an option.

LORD HANWORTH M.R. The facts can be stated in a few sentences. William Edward Carrington made his will on August 26, 1911, and on April 29, 1921, he made a codicil, but the terms of that codicil are unimportant. On December 13, 1927, he granted an option over some shares he was possessed of in S. R. Carrington & Sons, Ltd., to a third party, to be

(1) 1 Cox, 167.

(2) 12 Sim. 123.

(3) 1 J. & H. 424.

(4) [1928] Ch. 577.

(5) [1894] 3 Ch. 506.

(6) [1915] 2 Ch. 264.

(7) [1895] 1 Ch. 724.

(8) L. R. 17 Eq. 217.

C. A. exercised by him not later than one month after the testator's death. On January 31, 1930, the testator died, and on 1931 February 18, 1930, the grantee of the option exercised it. CARRINGTON, *In re.* The testator by his will made specific bequests of certain of RALPHS the shares in the company to his sister, to his niece and to the v. the wife of a nephew, and created the ordinary trust for sale and SWITHTEN- conversion of his property not otherwise disposed of by his BANK. Lord Hanworth will constituting his residuary estate. M.R.

The question is whether the specific bequests of these shares have been adeemed by the fact that the option has been exercised, with the result that the shares have been turned into money and no longer form part of the testator's estate. Maugham J. reluctantly came to the conclusion that they had been adeemed, and he followed *Lawes v. Bennett* (1) and *Weeding v. Weeding*. (2) He regretted having to do so, and said that he would be glad to have these cases reviewed by the Court of Appeal.

We have had the advantage of an argument by Mr. Henry Johnston to see whether it is possible for us to get rid of the reasoning and effect of those decisions. I share Maugham J.'s reluctance to follow those cases, but the sequence of authority is too prolonged and too strong to permit of any other result.

In *Lawes v. Bennett* (1) there was an option given before the will was made, and it was exercised after the death of the testator. The words which have given rise to the difficulty are in the judgment of Lord Kenyon (3): "When the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period."

It is said that the meaning of those words was that Lord Kenyon was there treating the option as relating back to the date on which it was given, but I doubt whether that is the necessary inference from the words used. But in *Weeding v. Weeding* (2) we have a case practically on all fours with

(1) 1 Cox, 167.

(2) 1 J. & H. 424.

(3) 1 Cox, 167, 171.

that which is before us. There the option was exercised after the death, and it was held that the property was converted from the date of the exercise of the option and passed to the residuary legatees. There is a difference between *Lawes v. Bennett* (1) and *Weeding v. Weeding* (2), as *Weeding v. Weeding* (2) was decided after the Wills Act, 1837, had come into force, and under s. 24 of that Act a will now speaks from the death of the testator. It would seem that according to the decision in *Weeding v. Weeding* (2) there x was in the present case a conversion when the option took effect on February 18, 1930, of these shares into money, consequently that part of the testator's estate is money and the shares no longer form part of his estate, the result of which is that the specific legacies have been adeemed and the legatees are deprived of the shares, just as if the testator had sold the shares in his lifetime. It is too late to upset the reasoning in *Lawes v. Bennett* (1) or to overrule *Weeding v. Weeding*. (2) In 1894 Chitty J. in *In re Isaacs* (3) had to consider whether the principle in *Lawes v. Bennett* (1) was applicable in the case of an intestacy, and, after going through the cases, he came to the conclusion that it was. He said (4): "I think the judgment in the case of *Townley v. Bedwell* (5) alone is a decision on the point, that the option does not operate completely to convert the property until it is exercised, because the rents in the interval after the testator's death go to the heir-at-law," and he also said that he did not adopt the principle that the conversion related back to the date of the contract. Those cases were considered by the Court of Appeal in *In re Marlay* (6), and the three judges said that under this doctrine of conversion when the option was exercised at a later date the effect was not to be taken as from the date of the giving of the original option but from the date when it was exercised. Pickford L.J. said (7): "I think it must be taken as settled that if and

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(1) 1 Cox, 167.

(4) [1894] 3 Ch. 511.

(2) 1 J. & H. 424.

(5) 14 Ves. 590.

(3) [1894] 3 Ch. 506.

(6) [1915] 2 Ch. 264.

(7) [1915] 2 Ch. 278.

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when the condition is fulfilled there will be a conversion of the real property affected by the contracts into personalty," and later on he said: "I think, therefore, that following these authorities we must hold that the conversion has not yet taken place, and that the Westmeath estates at the testator's death were vested in the defendant Bury for an estate in fee defeasible on the fulfilment of the condition and were not vested in the executors as such." Warrington L.J. said (1): "There is no question that in ordinary cases such a state of things operates to effect a conversion of the estate: *Lawes v. Bennett*. (2) It is contended that it does more, and that it effects a conversion as from the date of the conditional contract, so that in the present case the proceeds of the sale if and when carried out must be treated for all purposes, including the incidence of duty, as if they had formed part of the general personal estate. In my opinion this is not the true result of the authorities." One view appeared attractive—namely, that one might say with regard to personal property that as the option was not exercised till February 18, 1930, it was possible to hold that the shares were still part of the estate of the testator and that the specific bequests were effective even if subsequently to the testator's death they became money. In the course of the argument I put the case of a dividend on the shares arising before February 18, and suggested that the specific legatees might have been entitled to a portion of the dividend; but that view does not seem to be tenable having regard to what Warrington L.J. said in *In re Marlay* (1): "It is well settled that in such cases the rents and profits are payable to the heir or devisee, his heirs or assigns, until the happening of the event in question, and this I think can only be justified on the footing that the land vests in him as land, and remains so vested until it shifts by the happening of the event." It is plain then that the doctrine is that conversion does not take place at the date of the contract, but at the date when the condition is fulfilled which makes the contract effective. Then the interest shifts on the happening of that fulfilment. In

(1) [1915] 2 Ch. 281.

(2) 1 Cox, 167.

In re Pyle (1) Stirling J. held that conversion had not there taken place, but he was able to distinguish that case on the facts from *Lawes v. Bennett* (2) and *Weeding v. Weeding* (3) by saying that the case of *Emuss v. Smith* (4), which he said was extremely close to the case he had before him, was founded on three things: "the specific devise in the will, the optional nature of the contract, and the republication of the will by the codicil." He then continued (5): "Now, it seems to me that these elements exist in the present case, and one of them is even more forcible than in *Emuss v. Smith* (4); for, as I have said, in this case the testator expressly confirms his will by the codicil. There is one point of difference, namely, that in this case the lease and codicil were executed on the same day. There is a measure of uncertainty as to whether the lease preceded the codicil, or the codicil the lease, but it seems to me that the inference is, that if the lease conferring the option to purchase had not been actually executed when the testator made his codicil, it must have been on the eve of execution, and must have been present to the mind of the testator when he confirmed his will. Under these circumstances, I think there is a sufficient indication of intention to take the case out of the rule established by *Lawes v. Bennett* (2), and I so hold." We have no such facts here, and that case shows that unless there are such facts as were there found to exist the principle of *Lawes v. Bennett* (2) and *Weeding v. Weeding* (3) must be followed.

Therefore after searching for means to carry out the intention of the testator it appears that it is not possible to do so for the reason that there has been at the date of the exercise of this option a conversion, and then there is necessarily an ademption of the shares. Therefore the shares, the subject-matter of the specific legacies, have been taken away and adeemed by being changed into money.

There is one further point—namely, whether the residuary estate had been specifically dealt with by the will or left so

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(1) [1895] 1 Ch. 724.

(3) 1 J. & H. 424.

(2) 1 Cox, 167.

(4) 2 De G. & Sm. 722.

(5) [1895] 1 Ch. 724, 728.

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that there was an intestacy in respect of it. *In re Isaacs* (1) makes it plain that the principle of *Lawes v. Bennett* (2) would still apply to an intestacy. *In re Marlay* (3) approves and in effect follows that decision. I am therefore in the same position as Maugham J. was, and accordingly the appeal must be dismissed.

LAWRENCE L.J. I agree. Maugham J. felt himself unable to distinguish this case from *Weeding v. Weeding* (4), I also am unable to make any distinction. It is true that *Weeding v. Weeding* (4) was a decision of a Court of first instance and technically is not binding on this Court, but it was decided over seventy years ago and has been followed in many other cases; it would therefore not be right for this Court to overrule it now. The rule in *Lawes v. Bennett* (2), which Wood V.-C. followed in *Weeding v. Weeding* (4), although said to be anomalous, is too well established to be upset. In *Lawes v. Bennett* (2) the option was granted before the will, and the contention is that the real question there was whether the testator had expressed an intention in his will that, subject to the option, the specific legacy was to go to the legatee, and consequently that the decision in that case could be explained on the ground that it turned merely on the construction of the particular will; but that explanation of *Lawes v. Bennett* (2) is swept away by the decision in *Weeding v. Weeding* (4), in which case the option was granted after the date of the will, and yet the rule in *Lawes v. Bennett* (2) was applied. Chitty J. in *In re Isaacs* (1) explained that, in view of the decision in *Weeding v. Weeding* (4), the rule could not be treated as having been founded merely on the intention expressed by the testator in his will, and applied the rule to the case of an intestacy. In these circumstances I think that the appeal fails and ought to be dismissed.

ROMER L.J. I am most reluctantly compelled to come to the same conclusion. In *Lawes v. Bennett* (2), decided in

(1) [1894] 3 Ch. 506.

(3) [1915] 2 Ch. 264.

(2) 1 Cox, 167.

(4) 1 J. & H. 424.

1785, a lease of certain real estate conferred an option of purchase upon the lessee. After the date of the lease but before the option had been exercised the lessor made a will containing a general devise of his real estate to one person and a general bequest of his personal estate to others. The option having been exercised after the testator's death it was held that the proceeds of sale passed under the bequest of personal estate and not as part of the realty. The testator had in that case in effect given to the lessee by reason of the option power to elect whether he should convert the property or leave it as real estate, and therefore I can well understand that the parties interested under the will desired to know whether the testator intended to include the proceeds of sale in the devise or general residuary bequest. That being so *Lawes v. Bennett* (1) would not prima facie seem to apply to a case where the testator had not made a general devise of his real estate or had specifically devised the property. If that case had never been treated as laying down a general principle I should not have been embarrassed with it in the present case. But about eighty years afterwards it was laid down in *Weeding v. Weeding* (2) that the decision would apply as well to a case where the option was created after the date of the will as to a case where it was created before the will. In *Weeding v. Weeding* (2) the devise was not of the property the subject-matter of the option eo nomine but of all the testator's Kentish Town estate. Wood V.-C. came to the conclusion that by the Kentish Town estate the testator did not intend to include that part of it which had been made subject to the option. Sect. 24 of the Wills Act applied, and therefore the will was to be deemed to speak from the date of the testator's death, and the Vice-Chancellor said (3): "The intention is, that all the Kentish Town property is to go one way, all the personalty another. The testator must be taken to have known, when he had entered into the contract, that what would ultimately be Kentish Town estate would depend on the option of the lessee; and the inference is, that he meant

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(1) 1 Cox, 167.

(2) 1 J. & H. 424.

(3) 1 J. & H. 424, 431.

C. A. his property to go according to the state to which it would
 1931 be reduced by the exercise of that option." The decision
 CARRINGTON, therefore was merely one as to the intention shown by the
In re. testator in that particular case. But in his judgment the
 RALPHS Vice-Chancellor said (1): "I do not see how I can give any
 v. weight to the argument of the defendants, unless I can
 SWITHEN- distinguish the present case from *Lawes v. Bennett* (2) and
 BANK. *Townley v. Bedwell*. (3)" Therefore he obviously treated
 Romer L.J. *Lawes v. Bennett* (2) as applicable where the option came
 into being after the date of the testator's will. It is equally
 impossible at the present time to hold that *Lawes v. Bennett* (2)
 only applies where there is a general devise, because Chitty J.
 in 1894 decided in *In re Isaacs* (4) that the rule applied
 in the case of an intestacy. There are too other cases
 in which it was held that *Lawes v. Bennett* (2) laid
 down a general principle. In *In re Marlay* (5) Lord Cozens-
 Hardy M.R. said: "It was decided as long ago as 1785 by
 Sir Lloyd Kenyon M.R. in *Lawes v. Bennett* (6) that where
 a lease contains an option to the lessee to purchase the demised
 property for an agreed sum, and the option is not exercised
 until after the death of the lessor, the effect is that, as between
 the real and personal estate of the lessor, the purchase-money
 goes as personal estate and not as real estate to the devisee."

As the cases stand, where an option has been given by a
 testator over part of his real estate then, whether given
 before or after the date of the will, that real estate is to be
 treated for the purposes of devolution on death as devolving
 from the date of the exercise of the option as proceeds of sale
 and not as real estate. I do not myself understand apart
 from the authorities why this should be so. Conversion
 obviously takes effect from the exercise of the option only,
 and in the hands of the devisee of real estate the property
 as from the exercise of the option would be personal and not
 real estate. That is to say upon his death it would pass as
 part of his personal estate. But why the exercise of the option

(1) 1 J. & H. 429.

(2) 1 Cox, 167

(3) 14 Ves. 590.

(4) [1894] 3 Ch. 506.

(5) [1915] 2 Ch. 264, 275.

(6) 1 Cox, 167, 171.

should have the effect of taking away the real estate from the person to whom it has been devised and giving it to the person who has the personal estate is what I have never been able to understand. But there it is, and applying that rule to the present case, from the moment of the exercise of the option the shares ceased to belong to the legatees and the proceeds of sale of the shares passed to the residuary legatees. It is impossible for us to escape from the effect of those decisions, and therefore the appeal must be dismissed.

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Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co., for Coppock, Helm & Walmsley, Stockport; and for Addleshaw, Sons & Latham, Manchester; Grundy, Kershaw, Samson & Co., for Dibb & Clegg, Barnsley.*

W. I. C.

In re C. B. & M. (TAILORS), LIMITED.

EVE J.

1931

Oct. 13, 26.

[No. 00664 of 1930.]

Company—Winding-up—Compulsory Order—Costs—Taxation of Costs of Petition between Party and Party—Company solvent—Solicitor's Right of Proof for further Costs—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 261—Companies (Winding-up) Rules, 1929, r. 192.

A compulsory order having been made for the winding-up of a company on the ground of its being just and equitable to make such an order, the costs of the company of the petition were taxed and paid out of the assets on the basis that it was insolvent. The company was ultimately found to be solvent, and the solicitor claimed to prove in the liquidation for the balance of his bill of costs, being solicitor and client costs incurred upon the instructions of the company and its directors in opposing the petition. The liquidator rejected the proof on the ground that the amount claimed represented costs already taxed off the bill, and the registrar upheld his decision on the ground that there was no right of proof for any costs beyond the taxed costs of the petition under r. 192 of the Winding-up Rules, 1929:—

Held, that the solicitor was entitled to prove for any unpaid balance of costs due to him from the company, there being nothing to the contrary contained or implied in r. 192, which was concerned with the priorities of different sets of costs incurred in winding-up. There being sufficient to pay all creditors in full, the company's solicitor was entitled to be paid his costs as between solicitor and client, and the liquidator was ordered to admit the proof, subject to taxation if he so desired.

EVE J. MOTION.

1931 The applicant, Mr. Cosmo Cran, practising as Cosmo
C. B. & M. Cran & Co., solicitor, moved that an order of Mr. Registrar
(TAILORS), Stiebel dated July 27, 1931, dismissing the application of
LD., Mr. Cran that the decision of the liquidator of C. B. & M.
In re. (Tailors), Ltd., rejecting a proof of debt by Mr. Cran
should be reversed, and that the proof should be allowed
in full.

On December 1, 1930, an order was made for the compulsory winding-up of the company. The petitioner made allegations of misfeasance by the officers of the company in connection with the flotation, and Mr. Cran was instructed by the company and its directors to oppose the petition and to investigate the allegations and to brief leading counsel upon the hearing. This work involved heavy costs, which would not have been allowed on a party and party taxation. On the order for compulsory liquidation the applicant's costs were taxed between party and party on the basis that the company was insolvent, and the sum of 183*l.* 3*s.* 10*d.* was allowed. On June 18, 1931, the applicant rendered detailed bills of his charges in connection with the opposition to the petition, amounting to 433*l.* 8*s.* 6*d.*, including the above sum of 183*l.* 3*s.* 10*d.*, for which the liquidator accepted liability. The applicant then lodged a proof for the balance of his costs as between solicitor and client—namely, 250*l.* 4*s.* 8*d.*, but the liquidator rejected the proof on the ground that having been disallowed on taxation it could not be obtained by a proof of debt in the winding-up.

Both at the time of the presentation of the petition and at the date of the winding-up order the company was solvent, and the liquidator had funds in hand far more than sufficient to meet all the company's liabilities.

The applicant claimed that the sum of 250*l.* 4*s.* 8*d.* represented the amount of his professional fees as between solicitor and own client properly payable by the liquidator out of the assets of a solvent company, subject to taxation if the liquidator so required, and that he had received no satisfaction or security therefor.

The applicant took out a summons to reverse the liquidator's decision, but Mr. Registrar Stiebel refused to make any order thereon, except that the applicant pay the costs. He based his decision on the ground that r. 192 of the Winding-up Rules precluded the payment of any further costs beyond the taxed costs of the petition.

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H. A. Rose for the solicitor. This is a debt due from the company to its solicitor, who is entitled to prove for it like any other debt under s. 261. There is nothing in r. 192 of the Winding-up Rules to prevent the solicitor being entitled to be paid his full costs by the company. That rule deals with the priority of different sets of costs in winding-up, but here the company has turned out to be solvent and no question of priority arises. The rule assumes the company to be insolvent. Taxation of costs in winding-up proceedings is ordered only as a means of ascertaining the solicitor's claim against the assets: *In re Foss, Bilbrough, Plaskitt & Foss* (1); *In re Liverpool Household Stores Association*. (2) In the latter case Kekewich J. held that the official liquidator was not entitled to have bills of costs delivered by solicitors to a company taxed under the Solicitors Act, 1843. He said it was the settled practice for a solicitor to carry in his bills of costs as a claim to be admitted by the liquidator in the usual way, and the solicitor added his costs of taxation to the bill and received his dividend. If the amount was disputed the bill was taxed in the ordinary way.

Here the liquidator took the view that the taxation of costs between party and party amounted to a disallowance of the balance. An order for taxation between party and party is not equivalent to a disallowance of the items not covered by party and party costs. The rules and the Act must be read together. The material section of the Act is s. 178, which directs that an order for winding-up the company shall operate in favour of all the creditors: see also s. 261, requiring debts of all descriptions to be proved. The general policy of the Act is to direct payment of all the debts and liabilities

(1) [1912] 2 Ch. 161.

(2) (1889) W. N. 48.

EVE J. of the company, subject to the payment of preferential debts
 1931 in their proper order. The costs which the registrar has
 C. B. & M. disallowed are attributable to preliminary proceedings which
 (TAILORS), were for the benefit of all parties.
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[He also referred to *In re Osborn & Osborn* (1); *In re General Exchange Bank* (2); and *In re Beer, Brewer & Bowman*. (3)]

J. R. McCrindle for the liquidator. The order of the registrar was right. The only costs allowable against the liquidator and payable out of the assets are the costs taxed between party and party. As a rule solicitors get an indemnity for non-party and party costs from the directors. Here the costs which have been disallowed are much greater than those which have been allowed. The contributories have here been prejudiced by costs incurred by the directors in defending their own honour. There is no authority covering the point. The general rules as to costs of a petition to wind up a company were laid down by Lord Romilly in *In re Humber Ironworks Co.* (4)

H. A. Rose replied.

Cur. adv. vult.

EVE J. This is a motion in the winding-up of C. B. & M. (Tailors), Ltd., on the part of Mr. Cosmo Rose Cran, a solicitor practising as Cosmo Cran & Co., to set aside an order of the learned registrar dated July 27, 1931, affirming on somewhat different grounds the liquidator's rejection of a proof carried in by Mr. Cran in the winding-up proceedings. The proof is for costs and arises in the following circumstances.

On October 23, 1930, a petition was presented by a contributory for the compulsory winding-up of the company, and on the following day Mr. Cran was instructed to appear thereon for the company and to oppose the making of the order. On December 1 the usual compulsory order was made whereby it was amongst other things ordered that the costs of the company of the petition should be taxed and paid out

(1) [1913] 3 K. B. 862.

(2) (1867) L. R. 4 Eq. 138.

(3) (1915) 113 L. T. 990.

(4) (1866) L. R. 2 Eq. 15.

of the assets of the company. These costs, according to the affidavit filed in support of the motion, were taxed upon the basis that the company was insolvent, and on April 1 were allowed at the sum of 183*l.* 3*s.* 10*d.* But at the date of the winding-up order the company was indebted to Mr. Cran for costs incurred subsequent to the presentation of the petition in the sum of 433*l.* 8*s.* 6*d.*, including the costs subsequently taxed at 183*l.* 3*s.* 10*d.*, and on June 18 Mr. Cran rendered to the company a detailed bill for the larger amount, and after giving credit for the 183*l.* 3*s.* 10*d.* claimed to prove as a creditor for the balance subject to taxation.

The company it is to be noted is solvent, the liquidator having assets in hand more than enough to meet all the liabilities.

The liquidator rejected the proof on the ground that the amount claimed was the amount taxed off the bill brought in under the order of December 1, and therefore was an amount which having been disallowed could not be recovered by another method—namely, by proof of debt against the company.

I do not think that this objection can be maintained. The taxation under the order of December 1 was in the nature of a taxation *inter partes*, wherein many items in the bill might properly be disallowed or reduced and still be recoverable against the client in the solicitor and client taxation. The solicitor does not abandon his right to recover from his client items disallowed or reduced merely because he has made an unsuccessful attempt to recover them in the party and party taxation. The client is of course relieved of his obligation to pay the sums recovered in the party and party taxation, but cannot be heard to assert that the disallowance or reduction of items in that taxation operates to release him from his obligation subject to taxation to pay such items. For example, the client may have instructed his solicitor to brief a particular counsel and agreed the fees to be paid to him. In such a case the reduction of counsel's fees in the party and party taxation could not be relied on as relieving the client from his liability to pay the amounts which he had

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agreed should be paid. And the same observations may be made of other charges properly made against the client, but not recoverable on the party and party taxation. The taxation under the order of December 1 fixed the sum to be allowed as between party and party, but did not deprive the solicitor of his right to recover payment of such further sums as might be found to be due to him on a solicitor and client taxation.

The ground therefore on which the liquidator rejected the proof cannot in my opinion be supported.

On appeal the learned registrar adopted the view that r. 192 of the Companies (Winding-up) Rules, 1929, must be construed as dealing exhaustively with the costs payable out of the company's assets, and inasmuch as it makes no provision for the payment out of the assets of any costs owing to the solicitor over and above the taxed costs of the petition the solicitor has no right of proof in the winding-up of such further costs. Such a construction is calculated to bring about injustice, and ought not to be adopted unless the rule makes it imperative. The contract with the solicitor was entered into and the costs were incurred before the winding-up order and at a time when the company had power to enter into such a contract. The rule deals with the costs of the winding-up order and other costs, charges, and expenses incurred in the winding-up, and determines the priority of payment of these costs, but it does not purport to affect in any way costs for the recovery of which a proof may thereafter be tendered in a winding-up. It certainly does not say and I cannot interpret it as raising an implication that a proof may not be lodged for payment out of the assets which remain after discharging these priority costs for further costs incurred by the company over and above those for which priority is given by the rule. No doubt in practice the solicitor not infrequently requires a guarantee from some third party for these costs, but that is due to the fact that even though he proves for the full amount he is unlikely in most cases to get more than a dividend on the amount of his proof. A proof for unpaid costs is not less meritorious than

proofs for work done, services rendered, or goods supplied by other creditors, and I see no ground for construing the rule as raising an unjustifiable distinction between the creditor for costs and other creditors.

In the present case, where there is enough to pay all costs and all the creditors in full, questions of priority are of comparative unimportance, and I cannot see any valid ground for holding that the client—that is the company—ought to escape from its obligations to pay the solicitor the balance of costs properly incurred by him on the instructions of the company over and above those costs which he has recovered on the party and party taxation under the order of December 1. The bill he has delivered appears to be strictly in accord with approved practice (*In re Osborn & Osborn* (1), see in particular per Buckley L.J.), and I must discharge the order appealed from and direct the liquidator to admit the proof, subject if he so wishes to taxation of the whole bill under the statute in the ordinary course.

The costs of this appeal and of the hearing before the registrar to be paid by the company.

Solicitors : *Cosmo Cran & Co.* ; *Anstey & Co.*

(1) [1913] 3 K. B. 862, 868.

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1931

[No. 4 of 1930.]

July 27.
—

Bankruptcy—Judgment Debt—Execution—Incomplete at Date of Receiving Order—Benefit of Execution—Part Payment to Withdraw Sheriff—Further Part Payment to Avoid Re-seizure—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 40.

By s. 40 of the Bankruptcy Act, 1914, an execution creditor is not entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order and before notice of the presentation of any bankruptcy petition or of the commission of any available act of bankruptcy.

On September 17, 1928, the respondents recovered judgment in the High Court for 215*l.* and costs. On the following day the sheriff levied execution on the goods of the debtor under a writ of *fi. fa.* issued by the respondents to enforce their judgment.

On September 24, 1928, it was agreed in writing between the respondents and the debtor that in consideration of the respondents withdrawing execution, the debtor should pay to the respondents 15*l.* on account of the debt and costs and the balance thereof by monthly instalments, the debtor undertaking, in case of default in payment of any of the agreed instalments, to authorize the sheriff to retake possession.

In pursuance of the agreement the 15*l.* and the costs of the execution were paid; whereupon the sheriff withdrew. Up to October 22, 1929, the amount paid in respect of the instalments was 63*l.* and no more, and on January 10, 1930, the sheriff entered a second time into possession to levy execution for the balance of the debt remaining unpaid. On January 13, 1930, while the sheriff was in possession, a receiving order was made against the debtor on his own petition filed on the same day, and he was adjudicated bankrupt. On January 14 the respondents received notice of the receiving order.

On January 16, 1930, the Official Receiver, as trustee in the bankruptcy, claimed from the respondents payment of the two sums so received by them, amounting together to 78*l.*, as forming part of the bankrupt's estate available for the general body of his creditors, and on March 12, 1931, issued a notice of motion to enforce his claim. On the hearing of the motion before the judge of the Nottingham County Court, on April 30, 1931, a special case was stated under s. 100, sub-s. 3, of the Bankruptcy Act, 1914, for the opinion of the High Court, whether the respondents were entitled to retain or were bound to account for and pay to the trustee in bankruptcy the two sums of 15*l.* and 63*l.* so received by them or either of those sums:—

Held, that both sums so received by the respondents were, within the meaning of s. 40 of the Bankruptcy Act, 1914, benefits of the execution for which they were liable to account to the trustee in bankruptcy.

In re Ford [1900] 1 Q. B. 264 applied.

SPECIAL CASE.

On September 17, 1928, Shell-Mex, Ltd., the respondents to the motion, recovered judgment in the High Court for 215*l.* and costs against George W. Brelsford, who afterwards became bankrupt.

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On the following day the sheriff levied execution on the goods of the debtor under a writ of *fi. fa.* issued by the respondents for their judgment debt and costs.

On September 24, 1928, it was agreed in writing between the respondents and the debtor that, in consideration of the respondents withdrawing the execution, the debtor should pay to the respondents the sum of 15*l.* on account of the debt and costs and the balance thereof by monthly instalments of 10*l.* each, the debtor undertaking, in case of default in payment of any of the agreed instalments, to authorize the sheriff to retake possession.

In pursuance of that agreement the 15*l.* and the costs of the execution were paid, whereupon the sheriff withdrew. Between September 24, 1928, and October 22, 1929, the debtor paid to the respondents in respect of the instalments sums amounting together to 63*l.* only ; wherefore on January 10, 1930, the total amount paid up to that date in respect of the debt being 78*l.* and no more, the sheriff entered for the second time into possession of the debtor's goods to levy execution for the balance of the debt then remaining unpaid. On January 13, 1930, while the sheriff was still in possession, a receiving order was made against the debtor on his own petition filed on the same day, and he was adjudicated bankrupt. On January 14, 1930, the respondents received notice of the receiving order.

On January 16, 1930, the Official Receiver, as trustee in the bankruptcy, claimed from the respondents payment of the two sums so received by them, amounting together to 78*l.*, as forming part of the bankrupt's estate available for the general body of his creditors, and on March 12, 1931, issued a notice of motion to enforce his claim. On the hearing of the motion before the judge of the Nottingham County Court on April 30, 1931, a special case was, at the desire of

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 —

the parties, stated under s. 100, sub-s. 3, of the Bankruptcy Act, 1914, for the opinion of the High Court whether, in the circumstances stated above and having regard to the provisions of that Act, the respondents were entitled to retain or were bound to account for and pay to the trustee in bankruptcy the two sums of 15*l.* and 63*l.* so received by them or either of those sums.

Roland Burrows for the Official Receiver, the trustee in bankruptcy. The sum of 15*l.* which was paid to the judgment creditors to obtain the withdrawal of the sheriff is directly covered by the decision in *In re Ford* (1) and must be paid over to the trustee in bankruptcy, and the other sum of 63*l.*, which was paid to avoid a re-entry by the sheriff, is within the principle of that decision. The test applied by Channell J. in that case was whether the execution has been completed by seizure and sale of the goods. If a partial benefit only has been obtained, while a right to re-enter and levy for the balance of the debt is retained, the creditor is not entitled to retain that partial benefit, but must account for it to the general body of creditors. In *Figg v. Moore Brothers* (2) the facts and questions were quite different. The decision turned on the fact that before the money was paid to the sheriff the execution creditor had notice of an act of bankruptcy—namely, that the sheriff had been holding the goods for twenty-one days. In *In re Pollock & Pendle* (3) the trustee in bankruptcy was entitled to the money paid to the execution creditor in full satisfaction of the debt, because, owing to the money not having been paid to the sheriff, the execution had not been completed. In *In re Jenkins* (4) the execution was completed long before the date of the receiving order. In *In re Godding* (5) there was no seizure and sale, but the full amount of the levy was not paid to the sheriff and held by him in pursuance of s. 11 of the Bankruptcy Act, 1890. Horridge J. thought the definition of completion of

(1) [1900] 1 Q. B. 264, 268.

(3) (1902) 87 L. T. 238.

(2) [1894] 2 Q. B. 690.

(4) (1904) 90 L. T. 65.

(5) [1914] 2 K. B. 70.

execution in s. 45, sub-s. 2, of the Bankruptcy Act, 1883, and s. 11 of the Act of 1890, was exhaustive, but it was held otherwise in *In re Fairley* (1), which was an extension of the previous decisions: there the sheriff went in for the third time and returned nulla bona, and it was held that the execution was completed by that return. In *In re Evans* (2) Horridge J. laid it down that there must be completion of the execution as a whole, and, if completed by payment of the whole amount of the levy, that payment must be made to the sheriff.

Frank Gahan for Shell-Mex, Ltd. The property available for the payment of a bankrupt's debts is specified in s. 38 of the Bankruptcy Act, 1914, which is exhaustive. The sums in question did not belong to the bankrupt at the commencement of the bankruptcy; they belonged at that date to the judgment creditors. They are not seeking to retain a benefit of an execution. On payment the creditors' debt was discharged pro tanto, and he received the benefit of his debt. Benefit of the execution is a right in the debtor's goods, which at common law were charged with the debt from the issue of a writ of fi. fa. By s. 26 of the Sale of Goods Act, 1893, the goods are now only charged from delivery of the writ to the sheriff. Sect. 40 of the Bankruptcy Act, 1914, defeats the benefit of the execution—namely, the charge on the debtor's goods in case of bankruptcy, unless there has been seizure and sale or completion of the execution. So long as the debtor's goods or the proceeds of the sale thereof are in the hands of the sheriff, the property in them remains the debtor's. Consequently, the effect of s. 40 of the Act is that, if there has been seizure and sale or, under s. 41 of the Act, the sheriff has held the proceeds of sale or the money paid to avoid sale during fourteen days, the benefit the creditor has is still a benefit in the debtor's property. The benefit which the creditor gets on payment to him is the benefit of his debt and not the benefit of the execution. Upon the principle of *In re Ford* (3) s. 41 cannot be evaded by the money paid to avoid a sale and received in full satisfaction

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(1) [1922] 2 Ch. 791.

(2) (1916) 2 Han. Bk. Rep. 111.

(3) [1900] 1 Q. B. 264, 268.

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of the execution being paid to the creditor himself instead of to the sheriff. He cannot be in a better position than if the money had been paid to the sheriff. But the history of the section shows that it is a protecting and not a penalising section: Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), s. 133; Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 95. Unless this construction is adopted the execution creditor is in a worse position than a fraudulent creditor under s. 44, sub-s. 1. Payment discharges the debt, and if made before the date to which the trustee's title relates back the creditor has no right of proof under s. 30, sub-s. 3, of the Act of 1914. On any construction, neither of the sums in dispute were benefits of the execution within the meaning of the section: they were paid in pursuance of an independent agreement—namely, the agreement of September 24, 1928, as the consideration for the sheriff keeping out of possession and to avoid seizure of the goods: *In re Pearson*. (1) Therefore both sums belong to the execution creditors. No execution was in existence at the time of the payment of the 63*l.*: *Bower v. Hett* (2); *Crowder v. Long*. (3)

CLAUSON J. This is a special case stated by the county court judge of Nottingham on a question of law. The question is put in these terms: "The question for the opinion of the Court is, whether, having regard to the provisions of the Bankruptcy Act, 1914, a judgment creditor, who has caused an execution to be levied on the goods and chattels of a judgment debtor and has afterwards caused such execution to be withdrawn on terms that the judgment debt shall be paid by instalments with power, on a failure to pay such instalments, for the sheriff to re-enter and seize the judgment debtor's goods and chattels, is entitled, in the event of the judgment debtor being adjudicated bankrupt before the instalments have been fully paid, to retain or is bound to account and pay to the trustee in bankruptcy of such debtor: (a) the sums paid to him by the judgment debtor after the

(1) (1886) 3 Mor. 187.

(2) [1895] 2 Q. B. 51, 337.

(3) (1828) 8 B. & Cr. 598.

first levying of execution and while the sheriff was still in possession; (b) the sums paid to him by the judgment debtor after the first levying of execution, but while the sheriff was out of possession."

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The judgment creditors put in the sheriff on a writ of fi. fa. on September 18, 1928. Negotiations then took place between the judgment debtor and the judgment creditors with a view to arranging terms of payment of the debt by instalments; the result of which was that the judgment creditors authorized the sheriff's officer to withdraw from possession upon the following conditions being fully complied with—namely, that: "(a) the bankrupt should pay the costs of the sheriff in connection with the execution; (b) the bankrupt should pay forthwith the sum of 15*l.* on account of the judgment debt; (c) the bankrupt should undertake to pay the balance of the judgment debt by instalments of 10*l.* a month on the 21st day of each month; (d) the bankrupt should give an authority to the sheriff to re-enter into possession in the event of his failure to pay the instalments as they became due." The bankrupt there mentioned is the judgment debtor.

That arrangement having been made, the judgment debtor forthwith paid the costs of the execution and remitted to the judgment creditors the sum of 15*l.*; and the sheriff then withdrew from possession. At a time subsequent to such withdrawal the judgment debtor paid to the judgment creditors some further sums, amounting together to 63*l.* Those sums and the 15*l.* previously paid, totalling 78*l.*, were paid before the date at which the bankruptcy is to be deemed to have commenced.

The matter is governed by s. 40 of the Bankruptcy Act, 1914, which is in these terms: "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy

CLAUSON J. petition or of the commission of any available act of bankruptcy by the debtor. . . .” In the circumstances which I have stated it is plain—indeed, I do not think anybody disputes it—that the execution was not completed before the date of the receiving order; because, as between the various parties, there was a right in the judgment creditors to go in again and take further steps under the execution. The question I have to determine is whether, if the judgment creditors retain the 15*l.* and the 63*l.*, they will or will not be retaining the benefit of the execution against the trustee in bankruptcy of the debtor.

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A number of very difficult questions have arisen from time to time under this section, and a number of decisions have been given as to which I am entitled to say—and I am only repeating the language used by Horridge J. in *In re Godding* (1)—it is not always easy effectively and completely to reconcile them. I have heard a most interesting argument by Mr. Roland Burrows and Mr. Gahan, and I have looked at many authorities. It is not necessary for me to express, and I must not be taken, in any remarks I have made during the argument, to have expressed, any view upon the many difficult points which emerge on studying those cases.

I propose to decide this case simply upon the words of the section in the light thrown upon them by one case which is binding upon me, that is the case of *In re Ford*. (2) I need not travel through that case; but, having regard to the decision of the two learned judges, Wright and Channell JJ., sitting as a Divisional Court, it would to my mind be impossible for me, being bound by that decision, to hold otherwise than that, if the judgment creditors retained the 15*l.* in the present case, they would be retaining some part at least of the benefit of the execution, because they obtained that 15*l.* only as the price of their allowing the sheriff to go out of possession. Therefore it seems to me, having regard to that case, I am bound to hold that the judgment creditors are not entitled to retain the 15*l.*

(1) [1914] 2 K. B. 70.

(2) [1900] 1 Q. B. 264.

As regards the 63*l.*, it may be said the point is not precisely covered by authority, but I can only say that I should be whittling away the principle of the decision in *In re Ford* (1) if I did not hold with regard to that sum also that, as it was obtained as the price of permitting the sheriff not to re-seize the goods, the judgment creditors would, if they retained it, be retaining part of the benefit of the execution.

On these grounds I hold that the judgment creditors are not entitled to retain either of the sums of 15*l.* and 63*l.* Accordingly, I will answer the question put to me by declaring that the judgment creditors are bound to account to the trustee in bankruptcy for the 15*l.*, and also for the 63*l.*

By arrangement the costs of both parties were ordered to be paid out of the estate.

Solicitors : *Solicitor for the Board of Trade ; Waltons & Co.*

H. C. H.

In re TURNER.

HUDSON *v.* TURNER.

[1930. T. 1677.]

CLAUSON
J.

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BRELSFORD,
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1931
Feb. 27.

Will—Power of Appointment between Two Objects—Death of One Object before Testator—Entirety Appointed to Survivor—Validity of Power at Testator's Death—Validity of Appointment.

A testator empowered his wife to appoint his estate, subject to her own life interest therein, to his two children, a son and a daughter, in such proportions as she should think fit, and directed that in default of appointment it should be divided equally between them. The son predeceased him, leaving one child. The testator's widow by her will appointed the estate to the daughter. Upon a summons to determine whether the power was valid at the date of the testator's death, and whether the appointment was valid in regard to one half of the estate :—

Held, (i.) that by reason of the death of the son before the testator the widow had power to appoint only one half of the estate ;

(ii.) that the appointment, though excessive, was not wholly void, but was valid up to one half of the estate.

Reade v. Reade (1801) 5 Ves. 744 followed.

Boyle v. Bishop of Peterborough (1791) 1 Ves. Jun. 299 considered.

(1) [1900] 1 Q. B. 264.

MAUGHAM ORIGINATING SUMMONS.

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George Turner (hereinafter called "the testator") by his will dated October 31, 1888, appointed his wife Dorothy Turner sole executrix thereof and devised and bequeathed all his real and personal estate to his wife upon trust for conversion and, after payment of his funeral and testamentary expenses and debts, upon trust to invest the residue and to stand possessed thereof and of the investments for the time being representing the same in trust to pay the income thereof to herself during her life. The will then continued: "And I hereby empower my said wife to appoint my said trust estate to my two children in such proportions as she shall think fit, and in default of such appointment, and so far as such shall not extend, I direct that the same shall be equally divided between my said two children." The testator died on November 24, 1914. He had two children, a daughter, Annie Matilda Hudson (hereinafter called "the plaintiff"), and a son, Frederick James Turner. By his will dated November 12, 1914, Frederick James Turner appointed his wife Valentina Annie Turner (hereinafter called "the defendant") sole executrix thereof. He died on November 19, 1914, leaving one child, who was alive at the date of this summons.

By her will dated September 9, 1926, Dorothy Turner, the wife and executrix of the testator, appointed the plaintiff sole executrix thereof, and, after reciting the power of appointment contained in the testator's will, and reciting the death of Frederick James Turner, proceeded: "Now therefore under such circumstances and in exercise of such power of appointment vested in me as aforesaid I hereby give devise and appoint my husband's estate unto my said daughter Annie Matilda Hudson absolutely and it is my earnest wish that my said daughter shall give and convey unto my daughter-in-law Valentina Annie Turner of High Street Eccleshall aforesaid for her own absolute use and benefit so much of my husband's estate (so devised and appointed by me to my said daughter as aforesaid) as my said daughter in her own absolute discretion shall think fit. But I declare that such wish or desire of mine shall not create any trust whatsoever

either implied or constructive in respect of my husband's estate or under this my will and it shall not be compulsory or obligatory on the part of my said daughter to carry out my said wish unless she in her own absolute discretion wholly thinks fit to do so."

This summons was taken out on September 30, 1930, for the decision (inter alia) of the questions: (i.) whether the power of appointment contained in the will of the testator was at the date of his death a valid subsisting power, or whether by reason of the death of Frederick James Turner, one of the two objects of the power, during the lifetime of the testator, it was wholly or partly and if so to what extent destroyed; and (ii.) whether the appointment contained in the will of Dorothy Turner was valid as regards half of the husband's estate.

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Copping for the summons. The basis of the rule in *Reade v. Reade* (1) is the necessity of making appointments. [He referred to *Boyle v. Bishop of Peterborough* (2); *In re Ware* (3); and *Farwell on Powers*, 3rd ed., p. 187.]

Fawell for the defendant. The power extends to only one half of the estate and the purported exercise was wholly bad. Regard should be had to the precatory words in considering the effect of this attempt by a lady to appoint the whole of an estate, thinking that she has power to do so, when what she in fact has power to do is to appoint one half. There is authority for the proposition that an excessive appointment may be good pro tanto. [He referred to *Farwell on Powers*, 3rd ed., p. 365.] But the present case is wholly different from those in which it has been so held. Where a person seeking to ensure that the estate will go in equal shares appoints in excess of the power, it would be going very far to hold that such an appointment is bad only with regard to the excess if the result of so holding would be that the estate would go in unequal shares.

(1) 5 Ves. 744.

(2) 1 Ves. Jun. 299

(3) (1890) 45 Ch. D. 269.

MAUGHAM J. The question of law which arises in this case has been debated many times during the last hundred years or more. It is discussed in *Boyle v. Bishop of Peterborough* (1); *Reade v. Reade* (2); *In re Ware* (3); and in several other cases: in Sugden on Powers, 8th ed., pp. 416-423; in Farwell on Powers, 3rd ed., p. 187; and in Jarman on Wills, 7th ed., vol. iii., pp. 1778 et seq. It would take up time unnecessarily if I were to go through all those authorities and comment upon the views of the judges and authors, because in my opinion I must accept the current of authority as having long since led to a rule stated in Sugden on Powers (8th ed., at p. 421) in these terms: "Where a power is given by will to appoint an estate amongst several objects, and the estate in default of appointment is given to them as tenants in common, the death of any of the objects in the life of the testator will, *pro tanto*, defeat the power and devise over, so that the power and devise will only remain as to the shares of the survivors."

That is a rule which Lord St. Leonards derived from *Reade v. Reade* (2), a fact pointed out in Farwell on Powers, 3rd ed., at p. 187, and in Jarman on Wills, 7th ed., vol. iii., at p. 1779. In the second volume of the third edition of Powell on Devises, edited by Mr. Jarman, the learned editor made the following comments at pp. 374 and 375: "Where a power is given by will to appoint property among several objects, and the subject, in default of appointment, is given to them as *tenants in common*, a question sometimes arises whether, by the death of any of the objects in the life of the testator, by which their shares *under the devise* lapse, the power is defeated in respect of those shares. The learned author of the Treatise on Powers has advanced an opinion in the affirmative, and that the power remains only as to the shares of the survivors. That opinion, however, it is conceived, cannot be sustained. The case of *Boyle v. Bishop of Peterborough* (1) decided, that the death of any of the objects, *after the period of vesting*, does not prevent the

(1) 1 Ves. Jun. 299.

(2) 5 Ves. 744.

(3) (1890) 45 Ch. D. 269.

entire subject from being appointed to the survivors; MAUGHAM
 If, therefore, the decease of an object whose share has vested J.
 does not take that share out of the operation of the power, 1931
 it seems to follow, *pari ratione*, that the decease of an object, TURNER,
 the gift of whose share by that event lapses, does not, *pro* In re.
tanto, defeat it. It is impossible to find any solid principle HUDSON
 of distinction between the cases. The case of *Reade v.* v.
Reade (1) on which Mr. Sugden rests his position for the TURNER.
 failure, *pro tanto*, of the power (and which he admits to
 be not very intelligible), seems to be much too blind a case
 to be relied upon, as establishing a doctrine so entirely new,
 and discrepant to the principles of analogous cases. The
 admission of the claim of the heir at law of the object who
 died in the lifetime of the testator, unless he was also heir
 at law of the testator (in which case the reference to the
 other character was absurd), is quite unaccountable."

After that criticism, Lord St. Leonards reconsidered the
 whole point, and in Sugden on Powers, 8th ed., at p. 421,
 he says: "In some early editions of this work the author
 did not state the facts or judgment in *Reade v. Reade* (1),
 or give any opinion of his own upon the point, but extracted
 from it, not without some consideration, the following rule
 or principle, viz. : " [He then states the rule and continues :]
 "He sees no reason whatever to amend the text ; but he has
 investigated the point fully, because it is one of considerable
 importance, and the law, as before stated, has been ques-
 tioned. It is said that the point was decided by *Boyle and*
the Bishop of Peterborough." (2) The learned author then
 sets out in substance the passage from Powell on Devises,
 and adds this, which I think to be of some importance.
 "The question simply is, what did Lord Rosslyn decide ?
 And that I have endeavoured to show. The *distinction*,
 however, between the case before him and *Boyle and the*
Bishop of Peterborough (2), appears to be an obvious one.
 Where the objects are once living, and the power may be
 exercised in their favour, it operates as it was intended, and
 subsequent events will not defeat it, although they may

(1) 5 Ves. 744.

(2) 1 Ves. Jun. 299.

MAUGHAM vary its application ; but where the power as to an object
 J. never arose, and the share of the estate itself, which that
 1931 object, if living, would have taken in default of appointment,
 TURNER, lapses, it is reasonable that the power over that share should
In re. also lapse, if I may be allowed the expression. *Boyle v.*
 HUDSON *Bishop of Peterborough* (1) should not now be disturbed ;
 v. but it is not necessary to extend the principle to other
 TURNER. cases.”

It was after the expression of that view that there appeared in the 3rd ed. of Jarman on Wills a note which appears in the 7th ed., vol. iii., at p. 1779, and which states that in Sugden on Powers, 8th ed. : “ Great pains have been taken to establish the position in the text, in opposition to some remarks of the present writer in his volume appended to Powell, Dev., 3rd ed., 374, which remarks he has not here repeated ; for though he is still unable to discover any solid ground for the alleged difference of effect in regard to the power, where the partial failure of the gift takes place *before* and where it takes place *after* the death of the testator, yet as the cases commented on by the distinguished writer in question seem to favour such a doctrine, and as it is really of more importance that the rules on such points should be certain than that they should be decided in the manner most consistent with principle, he has not felt disposed to revive the discussion.”

That feeling is one that I share, and I am not disposed at this date to doubt the principle. I shall accordingly follow the rule and decide that by reason of the death of one of the two children before the death of the testator the power was thus far defeated, with the result that the widow had power to appoint one half of the estate. When the case is one, as here, of a power given by will to appoint between two named persons, and one of them dies during the lifetime of the testator, the power itself is limited, because it can be exercised only in favour of the survivor. It is not unreasonable to hold that, where the power relates only to the survivor, the will ought to be construed as if the power

(1) 1 Ves. Jun. 299.

over the share which might have been appointed to the object MAUGHAM J.
had pro tanto lapsed.

The second question—namely, whether the excessive appointment is wholly inoperative, arises on the will of Dorothy Turner. I do not think that I should be following the proper principle if I were so to decide. When the donee of a power of appointment has purported to exercise the power for an amount greater than that over which it was given, the appointment is good with regard to the correct amount. In a case like the present it ought to be held that the appointment has been properly exercised over one half of the husband's estate. There is, I think, no authority with regard to this particular form of appointment, but it is a sound principle that such an appointment ought to be allowed to operate.

Accordingly, the answer to the second question on the summons is that the appointment was valid up to one half of the husband's estate.

Solicitors: *Miller & Smiths, for Thomas Bagley, Stone, Staffordshire; Clinton & Co., for Henry Walters & Welch, Stone, Staffordshire.*

K. R. A. H.

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MAUGHAM
J.

In re HOOPER.

PARKER *v.* WARD.

[1930. H. 1786.]

1931
Feb. 27 ;
March 4.

Charity—Bequest to Trustees to provide for Care and Upkeep of Graves, Vault, Monuments, Tablet and Window, “so far as they legally can do so”—Validity.

A testator bequeathed to his executors and trustees money out of the income of which to provide, “so far as they legally can do so and in any manner that they may in their discretion arrange,” for the care and upkeep of certain graves, a vault, certain monuments, a tablet and a window. On a summons to determine whether the bequest was valid in whole or in part:—

Held, that (the rule against perpetuities not applying to the trust for the upkeep of the tablet and the window) the trust for the upkeep of the graves, the vault and the monuments was valid for twenty-one years from the testator's death.

Pirbright v. Salvey [1896] W. N. 86 followed.

ADJOURNED SUMMONS.

By his will dated December 8, 1927, Harry Dundee Hooper (hereinafter called “the testator”), appointed executors and trustees thereof, and by clause 8 thereof provided as follows: “I give and bequeath unto my trustees out of pure personalty the sum of one thousand pounds upon trust that they will invest the same and to the intent that so far as they legally can do so and in any manner that they may in their discretion arrange they will out of the annual income thereof provide for so long as may be practicable for the care and upkeep of the grave and monument in the Torquay cemetery of my dear father and mother and of the vault and monument there in which lie the remains of my said dear wife and two daughters, also the grave and monument in Shotley churchyard near Ipswich where my gallant and only son lies buried and of the tablet in Saint Matthias’ Church at Ilsham aforesaid to the memories of my said wife and children and the window in the same church to the memory of my late father. Provided always and I hereby expressly authorise and empower my

said trustees that if at any time by capital payments out of such sum of one thousand pounds or investments representing the same they can secure all or any of the objects aforesaid they shall be at liberty to do so. And in that event or events as to the surplus (if any) of such sum and any accumulations of income I give and bequeath the same to the Vicar and Churchwardens of Saint Matthias' Church Ilsham aforesaid for such purposes and for such objects as they in their uncontrolled discretion may determine."

The testator died on October 16, 1929, and this summons, taken out on May 17, 1930, on behalf of his executors and trustees, asked (inter alia) whether the bequest in clause 8 of the will of the sum of 1000*l.* to provide for the care and upkeep of the grave and monument and the vault and monument in the Torquay cemetery, the grave and monument in Shotley churchyard, and the tablet and window in Saint Matthias' Church at Ilsham was valid in whole or in part.

W. S. Norwood for the summons.

Cleveland-Stevens K.C. and *C. R. R. Romer* for the churchwardens of St. Matthias' Church. In *Pirbright v. Salwey* (1) there was a bequest of money for the upkeep and decoration of an inclosure for "so long as the law for the time being permits." That was held to be valid for at least twenty-one years after the testator's death. In the present case the phrase, "so far as they legally can do so," has the same effect as "so long as the law for the time being permits" had in that case, and the bequest is valid.

Wilfrid Hunt for the Royal National Lifeboat Institution, a residuary legatee.

Norman Daynes K.C., *H. B. Vaisey K.C.* and *G. H. Allen* for persons claiming to be entitled as next of kin.

Stafford Crossman for the Attorney-General.

MAUGHAM J. This point is one to my mind of doubt, and I should have felt some difficulty in deciding it if it were not for *Pirbright v. Salwey* (1), a decision of Stirling J., which

(1) [1896] W. N. 86.

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unfortunately is reported, as far as I know, only in the Weekly Notes. The report is as follows : “ A testator, after expressing his wish to be buried in the inclosure in which his child lay in the churchyard of E., bequeathed to the rector and churchwardens for the time being of the parish church 800*l.* Consols, to be invested in their joint names, the interest and dividends to be derived therefrom to be applied, so long as the law for the time being permitted, in keeping up the inclosure and decorating the same with flowers : *Held*, that the gift was valid for at least a period of 21 years from the testator’s death, and *semble* that it was not charitable.”

That was a decision arrived at by Stirling J., after argument by very eminent counsel. The case does not appear to have attracted much attention in text-books, but it does not appear to have been commented upon adversely, and I shall follow it.

The trustees here have the sum of 1000*l.* which they have to hold upon trust to “ invest the same and to the intent that so far as they legally can do so and in any manner that they may in their discretion arrange they will out of the annual income thereof ” do substantially four things : first, provide for the care and upkeep of the grave and monument in the Torquay cemetery ; secondly, for the care and upkeep of a vault and monument there in which lie the remains of the testator’s wife and daughter ; thirdly, for the care and upkeep of a grave and monument in Shotley churchyard near Ipswich, where the testator’s son lies buried ; and, fourthly, for the care and upkeep of the tablet in Saint Matthias’ Church at Ilsham to the memories of the testator’s wife and children and the window in the same church to the memory of his late father. All those four things have to be done expressly according to an arrangement made in the discretion of the trustees and so far as they legally can do so. I do not think that is distinguishable from the phrase “ so long as the law for the time being permits,” and the conclusion at which I arrive, following the decision I have mentioned, is that this trust is valid for a period of twenty-one years from

the testator's death so far as regards the three matters which involve the upkeep of graves or vaults or monuments in the churchyard or in the cemetery. As regards the tablet in St. Matthias' Church and the window in the same church there is no question but that that is a good charitable gift, and, therefore, the rule against perpetuities does not apply.

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Something has been said with regard to apportionment. To my mind there is no room for a legal apportionment, because it is left to the discretion of the trustees to arrange how much they will out of this income apply during the twenty-one years to the four objects in question. At the end of the twenty-one years any part which is not applied for the upkeep of the tablet and the window in St. Matthias' Church will, of course, be undisposed of and will fall, unless some other event happens, into residue.

Solicitors : *Woodcock, Ryland & Parker ; Cunliffe, Blake & Mossman ; Clayton, Sons & Fergus ; Field, Roscoe & Co. ; Treasury Solicitor.*

K. R. A. H.

MAUGHAM
J.

1931

March 5, 6.

In re WARREN.

WARREN *v.* WARREN.

[1930. W. 4473.]

Will—Made before 1926—Devise of Land—Codicil made after 1926 confirming Will and not mentioning Land—Land held upon Statutory Trusts—Conversion—No Ademption—Law of Property Act, 1925 (15 Geo. 5, c. 20), ss. 26, sub-s. 3, 35; Sch. I., Part IV., para. 1—Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 11), s. 7; Schedule.

Where a will made before 1926 and devising an undivided share in land is confirmed by a codicil made after 1926 not mentioning the land, the devise is effective, as the devisee takes the proceeds of sale of the land.

A testatrix by her will made in 1923 devised her undivided share in certain lands to her son absolutely. By a codicil made in 1927 she made certain alterations in the will, subject to which she confirmed it. The codicil did not affect the devise. The testatrix died in 1930. By the operation of para. 1 of Part IV. of the First Schedule to the Law of Property Act, 1925, the land had been, since January 1, 1926, held upon the statutory trusts declared by s. 35 of the Act. On a summons to determine whether the devise was adeemed by the joint operation of that paragraph and that section:—

Held, that it was not adeemed, and that the interest of the testatrix in the proceeds of sale went absolutely to the devisee.

In re Mellish [1929] 2 K. B. 81n., 82; *In re Kempthorne* [1930] 1 Ch. 268; and *In re Wheeler* [1929] 2 K. B. 81n., considered.

In re Newman [1930] 2 Ch. 409 and *Powys v. Mansfield* (1837) 3 Myl. & Cr. 359 considered and distinguished.

ADJOURNED SUMMONS.

By her will dated February 11, 1923, Rebecca Charlotte Warren (hereinafter called “the testatrix”) appointed her son Godfrey Francis Warren and her daughter Eva Charlotte Warren (hereinafter called “the plaintiff”) to be executors and trustees thereof, and provided as follows:—

3. “I devise my share in the land and hereditaments at Rampside in the County of Lancaster to the said Godfrey Francis Warren absolutely, but subject to and charged with all duties payable in respect thereof by reason of my death.”

6. (i.) “I devise and bequeath all the real and personal estate not hereby or by any codicil hereto otherwise specifically disposed of and which I can dispose of by will in any manner I think proper either as beneficially entitled thereto or under

any general power unto my trustees upon trust that my trustees shall sell the said real estate (including chattels real) and call in sell and convert into money such part of my personal estate as does not consist of money with power to postpone such sale and conversion for such a period as my trustees without being liable to account may think proper.”

(ii.) “I direct that the income of my personal estate however invested shall from my death be treated and applied as income and no part thereof shall be added to capital except accumulations of surplus income (if any) during a minority.”

7. “My trustees shall out of the money to arise from the sale and conversion of my said real and personal estate and out of my ready money pay my funeral and testamentary expenses death duties and debts and shall also provide for the annuity hereby bequeathed and shall divide the net proceeds of sale into four equal parts and shall pay one equal fourth part thereof to each of my children the said Godfrey Francis Warren, Eva Charlotte Warren and Maud Ella Warren and as to the remaining one-fourth part thereof my trustees shall invest the same in their names or under their control in or upon any investments hereby authorised with power for my trustees at discretion to change such investments for others of a like nature and shall stand possessed of the investments and of the annual income thereof upon trust in equal shares for the children or child of my late son Alfred Robert Warren who attain the age of twenty-five years. Upon the failure or determination of the last-mentioned trust in favour of the children or child of my said late son then the one-fourth share so held in trust as aforesaid shall be divided equally between such of my children the said Godfrey Francis Warren, Eva Charlotte Warren and Maud Ella Warren as shall then be living.”

By a codicil dated May 22, 1927, the testatrix made certain alterations to the will not material to be herein set forth, and subject to those alterations she confirmed the will. She died on May 21, 1930, without having revoked or further altered the will, which, with the codicil, was duly proved by the plaintiff and the said Godfrey Francis Warren. She was

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MAUGHAM at the date of the will possessed in her own right of an equal one-fourth share of the land and hereditaments at Rampside mentioned in the will, the remaining three-fourth shares being held by other persons. At the date of her death that property had not been sold, and by the operation of para. 1 of Part IV. of the First Schedule to the Law of Property Act, 1925, it was held upon the statutory trusts declared by s. 35 of that Act, so that as from January 1, 1926, the testatrix was entitled only to a share of the proceeds of the sale. At the date of her death there were living two children of her son Alfred Robert Warren—namely, Reginald Tancred Warren, born on October 18, 1911, and Phyllida Mary Warren, born on October 12, 1913. By this summons, taken out on November 17, 1930, the plaintiff asked that it might be determined whether the devise in the will of the share of the testatrix in the lands and hereditaments at Rampside was adeemed by the joint operation of s. 35 of and para. 1 of Part IV. of the First Schedule to the Law of Property Act, 1925.

Roger Turnbull for the summons.

J. F. Bowyer (*F. R. Evershed* with him) for the defendant Godfrey Francis Warren. It is not possible to argue that there has not been a conversion: *In re Price* (1); *In re Kempthorne*. (2) The present case is distinguishable from *In re Kempthorne* (2), as there is here a specific devise. [He referred also to *In re Newman*. (3)] In the present case this particular devise can be treated as a devise of whatever the testatrix had, realty or personalty, and in that respect the case is distinguishable from *In re Newman*. (3) [He referred also to the Law of Property Act, 1925, s. 35.] In *In re Mellish*, an unreported case referred to in *In re Wheeler* (4), the devise was enough to pass whatever estate the testator had, apart from the conversion that had taken effect by reason of the Law of Property Act, 1925. In Stroud's Judicial Dictionary, 2nd ed., vol. iii., p. 1859, occurs the following

(1) [1928] Ch. 579.

(2) [1930] 1 Ch. 268.

(3) [1930] 2 Ch. 409.

(4) [1929] 2 K. B. 81n., 82.

passage: "'Share,' *prima facie*, would not apply to real estate. (Per Turner V.-C., *Stokes v. Salomons*, 9 Hare, 83; 20 L. J. (Ch.) 343.)" The word "interest" is not much wider than "share." They are really synonymous terms. The distinction between the present case and *Powys v. Mansfield* (1) is that in the latter case the ademption was by a voluntary act of the testator, and here it is not. The principle involved in the present case centres round the question of intention, and the Court can distinguish the present case from *Powys v. Mansfield* (1) because of the method by which the intention was carried into effect. [He referred to *In re Lowman*. (2)] If the Court is of opinion that "share" must necessarily mean "undivided share," then, if the codicil revives the will, it becomes a mere misdescription. The case is covered by s. 23 of the Wills Act, 1837. [He referred to Jarman on Wills, 7th ed., vol. i., p. 148, and to *Blake v. Blake*. (3)] The present case is one in which the thing intended to be given is not "gone." The property still exists, and the beneficial interest in it remains the same: and the case is one which can well come within s. 23 of the Wills Act, 1837. The principle of *In re Kempthorne* (4); *In re Price* (5); and *In re Newman* (6) ought not to be extended further than it has already gone, if it is possible to avoid extending it.

L. W. Byrne for Maud Ella Warren, Reginald Tancred Warren, and Phyllida Mary Warren. There is no question in the present case of any such expression as "all my share or interest," or of any expression such as those relied upon in *In re Mellish* (7), and so far as misdescription goes the present case is indistinguishable from *In re Newman*. (6) In that case the trust for sale was on foot at the date of the will: here it was imposed subsequently. That was also the case in *Blake v. Blake* (8), where there was an overriding trust for sale. [He referred to *In re Kempthorne*. (4)] *In re Wheeler* (9) was treated in *In re Kempthorne* (4) as being a

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(1) 3 Myl. & Cr. 359.

(5) [1928] Ch. 579.

(2) [1895] 2 Ch. 348.

(6) [1930] 2 Ch. 409.

(3) (1880) 15 Ch. D. 481, 487.

(7) [1929] 2 K. B. 81*n*, 82.

(4) [1930] 1 Ch. 268.

(8) 15 Ch. D. 481.

(9) [1929] 2 K. B. 81*n*.

MAUGHAM J. to *In re Frewen* (1) ; *Hopwood v. Hopwood* (2) ; *Cowper v. Mantell* (3) ; and *Sidney v. Sidney*. (4)] That is a series of cases in all of which it was decided that a codicil does not revive a gift in a will which had in the interval been adeemed. *In re Lowman* (5) really does not touch this point at all, because it was really a case of misdescription and nothing else. The conversion had there been by an overriding power, and therefore the case does not throw any light upon the application of the doctrine of ademption. *Blake v. Blake* (6) is also a case in which the nature of the property had been changed by some overriding power actually in existence. In the present case the gift upon its true construction can be read only as a gift of land as land. The will cannot bear the construction which such words as "share or interest" would be susceptible of bearing. The case is covered in terms by *In re Newman* (7), the only distinction being the subsequent execution of the codicil : and *In re Lowman* (5) is distinguishable, because s. 23 of the Wills Act, 1837, does not apply.

MAUGHAM J. [having stated the facts:] It is not correct to say that the testatrix was entitled only to a share of the proceeds of sale. She had certain other rights. Apart from the recent legislation, there can be no question but that the devise was an effective devise to Mr. Warren : and the question for decision is whether, as the result of the recent legislation, the devise has been adeemed by operation of law. In considering that question it is important to note that the Legislature has not deprived the testatrix of all interest in the land. The "statutory trusts" (the meaning of which expression is set out in s. 35 of the Law of Property Act, 1925) are shortly to sell and hold the net proceeds on such trusts as may be requisite for giving effect to the rights of the persons interested in the land. Then by an amendment in the Schedule to the Law of Property (Amendment) Act, 1926,

(1) [1926] Ch. 580.

(4) (1873) L. R. 17 Eq. 65.

(2) (1859) 7 H. L. C. 728.

(5) [1895] 2 Ch. 348.

(3) (1856) 22 Beav. 223.

(6) 15 Ch. D. 481.

(7) [1930] 2 Ch. 409.

it is enacted, in substitution for s. 26, sub-s. 3, of the Act of 1925, that "trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this sub-section have been complied with."

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Having regard to the provisions of that sub-section, it is clear that trustees for sale would be acting wrongly, in general, in selling, if undivided beneficial owners required them not to sell. There is no doubt that, since the coming into force of the Law of Property Act, 1925, the position of undivided owners is different from what it was ~~before~~. That Act, for the purpose of simplifying the law, has introduced provisions for undivided shares, and has made partition actions unnecessary and obsolete. But in substance the beneficial interests of the undivided owners in regard to enjoyment so long as the land remains unsold have not been altered, and it is true to say that the ordinary layman possessed of an undivided share in land would be quite unaware of any alteration in his rights as the result of the Act.

I must now refer as shortly as may be to a number of cases. The first is *In re Mellish*, which has never been reported, but the effect of which is stated in *In re Wheeler*. (1) In *In re Mellish* (2) the testator, who died in 1927, by his will made in 1923, devised all his share and interest in the "Rushall" Estate to one C. J. Buchanan in fee simple. At the time of his death his interest in the "Rushall" Estate was a one-ninth undivided share in the legal estate in fee simple, and a one-ninth share in the net proceeds of sale of another third. He made no codicil: and Eve J. held that "the devise of the testator's share or interest in the 'Rushall' Estate was not adeemed in whole or in part by the Law of Property Act, 1925, and that the devise took effect as a bequest of the testator's interest therein and the proceeds of sale thereof."

(1) [1929] 2 K. B. 81*n*.

(2) [1929] 2 K. B. 81*n*., 82, 83.

MAUGHAM J. The next case is *In re Wheeler* (1), a decision of Tomlin J. In that case the devise was contained in a will dated June 24, 1925. The testator devised all his real estate and undivided shares of real estate in the County of York, subject to the payment of a yearly rentcharge, to his grandson, Sir Delaval James A. Cotter, Bt. (who was an infant), and his assigns during his life, with remainders over. He made a codicil to his will dated September 3, 1927, whereby he gave certain legacies and confirmed his will, and he died on September 27, 1927. The estate duty on the real estate in the County of York was paid out of personal property, the real estate being treated as personal estate by reason of the notional conversion by virtue of the statutory trust for sale on which the estate was held at the testator's death under the Law of Property Act, 1925, Sch. I., Part IV., para. 1, sub-para. 2. But the question arose how the duty ought ultimately to be borne as between the persons entitled to the testator's interest in the land or the proceeds of sale thereof, and the persons entitled to the testator's residuary estate, and *In re Mellish* (2) was cited. Tomlin J. stated the relevant parts of the will, referred to the codicil, and cited *In re Mellish* (2), of which decision he certainly did not disapprove. In regard to the question raised before him he followed that decision, and held that the estate duty on the proceeds of sale of the real estate of the tenant for life ought to be borne by the persons entitled to that interest.

A somewhat similar case came before me in *In re Kempthorne*. (3) It will be noted, however, that in that case the testator by his will dated December 2, 1911, devised to his brother "all my freehold and copyhold property" in quite general terms, and disposed of the residue to persons other than the devisee. There was no codicil. The testator died on August 15, 1928, and the question which arose was whether the real estate of which he was possessed at the date of his will did or did not become personal estate at the date of his death. Following what I thought was the view

(1) [1929] 2 K. B. 81n.

(2) [1929] 2 K. B. 81n., 82.

(3) [1930] 1 Ch. 268.

of Clauson J. in *In re Price* (1), I held that the undivided shares in the testator's land passed under the gift in the will contained of "all the personal estate" of the testator. The matter went to the Court of Appeal, and the Court of Appeal approved of at any rate that part of my decision. Lord Hanworth M.R. cited *In re Wheeler* (2) and *In re Mellish* (3), and did not disapprove of them, although he stated that they were "based upon the interpretation given to the gifts in the two wills." Russell L.J. also referred to those two cases without disapproval, and said that in *In re Wheeler* (2) the distinguishing feature, in his opinion, was "that although the testator's devise was of all his real estate and undivided moiety of his real estate in the county of York, he had, after the Act had been passed, made a codicil by which he confirmed his will; so that his testamentary disposition had to be treated as one made at the date of the codicil:" and he added: "The learned judge must necessarily have taken the view that, when the testator used that language, he must have been intending to apply it to the interest, whatever it was, which he had in the real estate or undivided share of real estate in the county of York." (4)

A somewhat similar problem came before Farwell J. in *In re Newman*. (5) In that case a testator and his brother John were entitled, at the date of the testator's will, to certain freehold property in Rose Alley and Bear Gardens, Southwark, as tenants in common in equal undivided moieties. By his will dated May 15, 1922, the testator devised unto and to the use of John his heirs and assigns "all my moiety or equal half part or share and all other my share in the factory and hereditaments situate at Rose Alley and Bear Gardens" to hold the same for his own beneficial and absolute use subject to certain payments. The testator died on December 29, 1929, without altering or confirming his will. Farwell J. decided that the specific devise was adeemed by the imposition of the statutory trusts by the Law of Property

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(1) [1928] Ch. 579, 590.

(3) [1929] 2 K. B. 81*n*, 82.

(2) [1929] 2 K. B. 81*n*.

(4) [1930] 1 Ch. 268, 293.

(5) [1930] 2 Ch. 409.



MAUGHAM Act, 1925, and that the testator's brother John took nothing.

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He went through the relevant cases, and concluded that (1):
“ If the testator uses language that can only be construed as a devise of real estate, and, notwithstanding the imposition of the statutory trusts, he dies without altering or confirming his will, the conversion effected by the statutory trusts adeems the devise, because there is nothing left for that devise to operate on. If on the other hand the testator uses language wide enough to carry any interest in the property whether it be in law real or personal property, the conversion is immaterial.” Dealing with the testator's language, the learned judge said: “ It is in my judgment not apt to pass anything but a moiety of real estate, and as there is no real estate left the devise does not operate:” and he held that the whole devise failed.

I should add that the learned judge in that case did rely upon the fact that the actual language of the will was such as to make it clear that the testator was devising his real estate and nothing else. It is clear that that is not a case in which there was a confirmation by a codicil executed after the coming into force of the Law of Property Act, 1925.

I should be disposed to follow that decision in a case that was like it. But I think it right to say that I attribute weight in these cases to the consideration that the result of the statutory trusts is not wholly to deprive the person previously entitled to an undivided share of all interest in the land: and the language of the testator may well be such that that consideration may result in the decision that there is no ademption.

In considering the effect of the codicil I have to bear in mind the decision in *Powys v. Mansfield* (2), where Lord Cottenham had to deal with the effect of such a codicil in relation to one of the various problems of ademption which arise as between persons in loco parentis and a child. There had been, it seems, a legacy of 10,000*l.*, which, according to the ordinary doctrine of the Court of Chancery, had been adeemed by a subsequent provision for the legatee. After

(1) [1930] 2 Ch. 409, 417.

(2) (1837) 3 Myl. & Cr. 359.

the provision the testator had made a codicil in 1818 confirming the will: and Lord Cottenham points out as follows (1): "It has been argued that the codicil of the 23rd of June, 1818, confirming the will, makes the will speak as of the date of the codicil, and therefore revives the legacy, if it had been adeemed by the settlement; and, at all events, is evidence of an intention that the legacy should take effect. It is very true that a codicil republishing a will makes the will speak as from its own date for the purpose of passing after-purchased lands, but not for the purpose of reviving a legacy revoked, adeemed, or satisfied. The codicil can only act upon the will as it existed at the time; and, at the time, the legacy revoked, adeemed, or satisfied formed no part of it."

He cites cases, and concludes (2): "And as to the argument that the codicil must, at any rate, be evidence of an intention that both sums should be paid, the same answer may be given which has been given to a similar argument in other cases; namely, that the testator, if he knew the rule of law, must have known that the codicil would not revive the adeemed legacy, and, therefore, it was unnecessary for him to mention it: the probability, however, is, that his attention being directed to the only object of the codicil, the words of confirmation of the will were introduced as words of course, without any reference to the legacy in question."

I am bound by that decision so far as it is in point. But it seems to me that, although we commonly use the word "ademption" to describe the results of ademption by portion or by acts of the testator after the date of the will, and also to describe the destruction or alteration of the subject-matter of the devise or bequest after the date of the will by events which take place independently of the testator and possibly without his knowledge, the two things are really different. The judgment of Lord Cottenham shows that, where the question is whether a new legacy is being given by the confirmation of a will by a codicil so as to give a child a double

(1) (1837) 3 Myl. & Cr. 359, 375. (2) (1837) 3 Myl. & Cr. 359, 376.

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MAUGHAM portion, the question must be answered as he answered it.

J. But I am not satisfied that the same result should follow.
 1931 when an alteration in the nature of property has taken
 WARREN, place by operation of law, and the testator by a codicil has
In re. confirmed his will after the alteration of the law. It may
 WARREN be worth while pointing out that not every alteration in the
v. nature of a testator's interest in specific property is enough
 WARREN. to work ademption. It may, also, help to show the nature
 — of the problem before the Court to call attention to the case
 of *Oakes v. Oakes*. (1) That was a case dealing with shares
 in a railway company. At the end of his judgment Sir
 George Turner V.-C. said: "If the testator gave all stock
 standing in his name at the date of his will, and it turned
 out that there was some stock standing in the name of a
 mortgagee, the equity of redemption in that stock would
 not pass; but if it happened, that, at the date of his will,
 there was stock standing in his name, and that the testator
 had subsequently mortgaged it, the mortgage would not
 have adeemed or revoked the bequest. So, in this case, the
 testator had this property at the time he made his will, and
 it has since been changed in name or form only."

That decision is approved in *In re Slater* (2), where Cozens-Hardy M.R. referred to the accuracy of the language and said that there was great force in the words "... changed in name or form only. The question is, whether a testator has at the time of his death the same thing existing, it may be in a different shape,—yet substantially the same thing."

I return now to the present case. The testatrix, subject to certain modifications, confirmed her will. *Prima facie* that means that she confirmed the devises partly contained in paragraph 3 of the will. There can be no doubt at all that if, in the codicil, she had used the words contained in that paragraph, her undivided share in the proceeds of sale would have passed: *In re Lowman*. (3)

I do not regard *Powys v. Mansfield* (4) as laying down the general proposition that no kind of so-called ademption

(1) (1852) 9 Hare, 666, 672.

(2) [1907] 1 Ch. 665, 672.

(3) [1895] 2 Ch. 348.

(4) 3 Myl. & Cr. 359.

could be prevented by the confirmation of a will by a codicil. MAUGHAM J.
 The question is one of the testator's intention, according to the rules laid down by the Court for the construction of wills. Having regard to the various considerations that I have mentioned, and to the facts that the testatrix had not parted with the whole of her interest in the land, that what she is here devising is her share of it, and that she has, after the alteration of the law, confirmed her will without any mention of the real estate or of that share, I am of opinion that the devise took effect in the sense that the interest in the proceeds of sale passed to Godfrey Francis Warren absolutely. In coming to that conclusion, without saying that I rely on *In re Wheeler* (1), I am glad to think that, in substance, I am following the line of thought which commended itself to the Court in that case.

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Solicitors : *Ford, Lloyd, Bartlett & Michelmores, for Hillman, Burt & Warren, Eastbourne.*

(1) [1929] 2 K. B. 81n.

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Considered. Re DIPLOCK'S ESTATE.
[1948] 2 All E.R. 318.

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In re Petition of Right of ANNIE MURTHA MINAHAN.

Feb. 26 ;
March 25.

[1930. B. 1791.]

Limitations, Statute of—Intestate—Personal Estate—Transfer under Order of Court to Paymaster-General—Claim by Personal Representative of Next of Kin—Nature of Claim against Crown—Lapse of Time—Limitation Act, 1623 (21 Jac. 1, c. 16)—Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), ss. 2, 3.

The suppliant on a petition of right claimed to be entitled to the estate of an intestate who died on September 23, 1876. The petition stated that the suppliant was the legal personal representative of the grandchild of a paternal aunt of the intestate who died in 1886; that by an order dated June 23, 1883, it was declared that Queen Victoria was in right of her Royal Prerogative entitled to the intestate's personal estate, that it was ordered that the residue be paid by the Treasury Solicitor to such persons as Her Majesty or the Lords Commissioners of the Treasury should direct; that, pursuant to that order, the residue was transferred to the Paymaster-General; and that, at the date of the petition, the money, stocks and funds in question formed part of the Consolidated Fund and were held in trust for the intestate's next of kin. The petition submitted that an inquiry ought to be directed to ascertain who were the persons entitled to the estate and to what extent, and that the amount should be paid over to them.

The Crown by demurrer pleaded that the claim was barred by the Limitation Act, 1623, and that the petition was bad in substance and in law on the ground that, on the facts therein alleged, no part of the money, stocks and funds constituting or representing the personal estate of the intestate, or forming part of the Consolidated Fund, was held in trust for the next of kin:—

Held, that the Crown succeeded on the point taken by the demurrer and that the petition must be dismissed.

In re Robinson [1911] 1 Ch. 502; *In re Mason* [1928] Ch. 385; [1929] 1 Ch. 1; and *Brooksbank v. Smith* (1836) 2 Y. & C. Ex. Eq. 58 considered.'

Soar v. Ashwell [1893] 2 Q. B. 390; *Friend v. Young* [1897] 2 Ch. 421; and *Hovenden v. Lord Annesley* (1806) 2 Sch. & Lef. 607 referred to.

PETITION OF RIGHT.

The following statement of facts is taken substantially from his Lordship's considered judgment:—

This is a petition of right in the matter of the estate of Helen Blake deceased presented by Annie Murtha Minahan praying for an inquiry as to who were the persons by virtue

of the statutes for the distribution of the estates of intestates in force at the date of the death of the said Helen Blake entitled to her personal estate and for consequential directions. The suppliant claims to be the legal personal representative of one William Leonard, who is stated in the petition to have been the next of kin or one of the next of kin of the intestate. The matter comes on before the Court on a demurrer, and the Attorney-General on behalf of the Crown has consented to the points of law being set down for hearing and disposed of before the trial of the issues of fact raised by the petition. The facts stated in the petition must, of course, be treated as admitted for the purposes of the demurrer.

Helen Blake (hereinafter called "the intestate") died on September 23, 1876, intestate, and she did not leave her surviving any child or other issue or parent or remoter ancestor or brother or sister or any child or other issue of any brother or sister or any uncle or aunt or any child of any uncle or aunt her surviving. William Leonard, who was the grandchild of a paternal aunt of the intestate, died in 1886, and the suppliant claims to be his legal personal representative. It is stated in the petition that, ever since the death of the intestate, both William Leonard and the suppliant have from time to time tried to obtain evidence to prove before the Court the claims of William Leonard to the intestate's estate. On March 14, 1877, letters of administration to the estate of the intestate were granted out of the Principal Registry of the Probate Division to the solicitor for the affairs of Her Majesty's Treasury for the use of Her Majesty.

By a judgment dated April 14, 1877, in a proceeding the short title whereof was "*Re Helen Blake, deceased. The Solicitor for the affairs of Her Majesty's Treasury v. Her Majesty's Attorney-General*, 1877, B., No. 132," certain accounts and inquiries were directed, and by a further order in the said proceedings dated June 23, 1883, it was declared that Her Majesty in right of her Royal Prerogative was entitled to the personal estate of the intestate found by the Court to be outstanding and undisposed of, and the residue of the personal estate subject to the payment of costs—namely,

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MAUGHAM the sum of 93,587*l.* 8*s.* 1*d.*, was ordered to be paid or transferred
 J. by the plaintiff in the said proceedings to such persons or such
 1931 accounts and in such manner as Her Majesty the Queen or
 { BLAKE, the Lords Commissioners of Her Majesty's Treasury should
 In re. from time to time direct. Pursuant to the said order the said
 ANNIE moneys, stocks and funds were paid over and transferred to
 MURTHA Her Majesty's Paymaster-General. William Leonard died
 MINAHAN, in 1886. By para. 17 of the petition it is alleged that the
 In re Petition said moneys, stocks and funds now form part of the Consoli-
 of Right of. dated Fund, and it is added as a contention of law that the
 — same are held in trust for the next of kin of the intestate.

The Hon. Sir Stafford Cripps S.-G. and Stafford Crossman for the Crown. This matter arises on a demurrer on two points, the chief plea being that the claim is barred by the Limitation Act, 1623. The ground for contending that it is so barred, and for contending that the money cannot be in the Consolidated Fund for the benefit of next of kin is a great deal stronger in this case than it was in *In re Mason* (1), in which there had been an order of the Court for payment of the money to the Crown. In the present case there can be no question of mistake; and, so long as the order stands, it would be impossible to hold that there had been created a trust of this money in favour of some one else. The argument in *In re Mason* (1) turned largely upon the taking of an indemnity by the Crown, and it was said that by taking an indemnity the Crown acknowledged that there was some kind of right in the next of kin. The present case is against a third party—namely, the Crown, which merely received the money from the Treasury Solicitor under an order of the Court. That is the distinction between the present case and *In re Mason*. (1) The Treasury Solicitor could take no other course; he would have been guilty of contempt of Court if he had done so. When the Treasury Solicitor holds moneys in cases of this kind, he is just the same as any other solicitor for these purposes. He is an independent administrator. A chartered accountant might have been appointed. But it just happens that the person

(1) [1928] Ch. 385; [1929] 1 Ch. 1.

appointed was the Treasury Solicitor. Sect. 2 of the Intestates Estates Act, 1884, deals with the recovery of the personal estate of deceased persons where administration is granted to a nominee of the Crown. (1) The judgments in *In re Mason* (2) clearly and conclusively cover the present case. The only distinction is that in that case there was not in fact an order of the Court under which the payment was made. In the present case there has been an order of the Court, and if that makes any difference the difference must be in favour of the Crown. The claim in the present case is barred, and the demurrer ought therefore to succeed.

H. B. Vaisey K.C. and *A. C. Edgar* for the suppliant. These being proceedings by way of demurrer, for the purposes of the argument on behalf of the Crown, the party objecting is taken to admit all the facts alleged in the pleading of the suppliant. The suppliant does not allege that any trust was created, or that the Crown took otherwise than as a supposed beneficiary. This is a case of money paid by mistake to a supposed beneficiary who proves not to be a beneficiary. These funds, now part of the Consolidated Fund, are, if they can be found, impressed with a trust from which they have never been relieved: *In re Mason* (2); *In re Robinson*. (3) If the fund can be found the trust affects it, and it does not matter in whose hands it is: *Brooksbank v. Smith*. (4) That case was in the nature of an action to establish a special lien, to which the Limitation Act, 1623, applies only by analogy. [They referred to *Baker v. Courage & Co.* (5)] The claim in the

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(1) Sect. 2: "Where the administration of the personal estate of any deceased person is granted to a nominee of Her Majesty (whether the Treasury Solicitor, or a person nominated by the Treasury Solicitor, or any other person), any action or other proceeding by or against such nominee for the recovery of the personal estate of such deceased person, or any share thereof, shall be of the same character, and be

brought, instituted, and carried on in the same manner, and be subject to the same rules of law and equity (including the rules of limitation under the statutes of limitation or otherwise), in all respects as if the administration had been granted to such nominee as one of the next of kin of such deceased person."

(2) [1928] Ch. 385; [1929] 1 Ch. 1.

(3) [1911] 1 Ch. 502.

(4) 2 Y. & C. Ex. 58.

(5) [1910] 1 K. B. 56.

MAUGHAM present case is for the retransfer of property which, ex concessis, for the purposes of this argument, is now in the Consolidated Fund, and the Limitation Act, 1623, does not apply. [They referred to *In re Rivers* (1) and *In re Eyre-Williams*. (2)] No statute of limitations has destroyed the trusts affecting this fund, because it still exists as an identifiable fund. The Court is therefore asked to decide that this petition succeeds and that these proceedings by way of demurrer ought not to be allowed to continue.

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The Hon. Sir Stafford Cripps S.-G. in reply. In *Brooksbank v. Smith* (3) it was alleged that the Limitation Act, 1623, could not avail the defendant. In the present case it is clear on the petition that the mistake was discovered by the suppliant almost immediately after the death. Money paid under circumstances of this kind to the Crown or to any other third party is not necessarily impressed with a trust of any kind, either in the future or at any other time. It may be that the remedy is a remedy in debt. In a case of this kind the right arising is a right of natural justice, and the obtaining of the refund of the moneys is founded upon the equities of the suppliant's case, as it were, upon a contract. In *In re Mason* (4) the question as to the nature of the moneys when received by the Crown was exactly the same as it is in the present case. If the action was brought the very next day after the receipt of the money, it would have to be an action for money had and received. The question of dealing with that money may affect the nature of the action, which takes its nature from the nature of the payment to the Crown. [He referred to *Lewin on Trusts*, 13th ed., p. 877.]

Cur. adv. vult.

March 25. MAUGHAM J. [having stated the facts substantially as set out above:] I do not think it is necessary at the moment to state any of the further allegations in the petition, having regard to the demurrer, which raises the

(1) [1920] 1 Ch. 320.

(2) [1923] 2 Ch. 533.

(3) 2 Y. & C. Ex. Eq. 58.

(4) [1928] Ch. 385.

point whether the claim of the suppliant is maintainable against His Majesty by reason of the relevant Statutes of Limitation and of s. 3 of the Intestates Estates Act, 1884, and this point is the only point with which I shall now deal. I should, perhaps, observe that having regard to s. 56 of the Administration of Estates Act, 1925, the Intestates Estates Act, 1884, is repealed only so far as it applies to deaths occurring after the commencement of the Act of 1925. In these circumstances it is s. 3 of the Intestates Estates Act, 1884, which is applicable, and not s. 30 of the Administration of Estates Act, 1925. Sect. 3 of the Intestates Estates Act, 1884, is in the following terms (1): [His Lordship read the section, and continued:] Before commenting on this section it is necessary to read s. 2 of the same Act, which is as follows: [His Lordship read the section, and continued:] It is apparent that s. 2, unlike s. 3, is dealing with a proceeding against an administrator, who is the nominee of the Crown, whether the Treasury Solicitor (a corporation sole under the Treasury Solicitor Act, 1876) or a person nominated by the Treasury Solicitor or any other person. It may be useful to observe that an action against an administrator of the personal estate of a deceased person at the date of the Act was liable to be defeated by the limitation of twenty years imposed by the Law of Property Amendment Act, 1860, s. 13. This Act was wholly repealed by the Law of Property Amendment Act, 1924, but (by an unfortunate slip) without any saving for the case of deaths which have occurred before December 31, 1925; but in the present case the proceeding by Annie Murtha Minahan is not in the form of an action against the Treasury Solicitor, so that s. 2 of the Intestates Estates Act, 1884, is not the relevant section. Sect. 3 of that Act, however, has this effect:

(1) Sect. 3. "After the passing of this Act an information or other proceeding on the part of Her Majesty shall not be filed or instituted, and a petition of right shall not be presented, in respect of the personal estate of any deceased person or any

part or share thereof, or any claim thereon, except within the same time and subject to the same rules of law and equity in and subject to which an action for the like purpose might be brought by or against a subject."

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MAUGHAM J. that any statute of limitations and the same rules of law and equity which would apply to an action against a subject for the recovery of the personal estate of Helen Blake, deceased, can be relied on by the Crown on the present petition of right. Having regard to the plain distinction between the language used in s. 2 and that used in s. 3, it must, I think, be evident that where the Crown is being sued the actions contemplated by the latter section are actions against a subject to whom the administrator has wrongly paid part of the personal estate of the intestate. Such an action might have different forms. An action in the Chancery Division brought by the next of kin against a person to whom the administrator had wrongly paid part of the personal estate of the intestate under a mistake of fact (not joining the administrator and seeking administration) would be in the nature of a common law action for money had and received, and the Court acting on the analogy of the Statute of James I. (21 Jac. 1, c. 16) would hold the claim to be barred after the lapse of six years from the date of payment: see *In re Robinson* (1), where the law is elaborately explained by Warrington J., and *In re Mason*. (2) A common law action of the same character, assuming that such an action would lie, would also be barred by the same statute after the expiration of six years from the date of payment: *Baker v. Courage & Co.* (3) On the other hand there is no doubt that in a proper case the next of kin might bring an action in the Chancery Division to follow the trust property if the defendant to whom the administrator had paid it were still in possession of it. It is in this way that Mr. Vaisey, on behalf of the suppliant, sought to support the present petition, and great reliance was placed on para. 17 of the petition, which stated that "the aforesaid moneys, stocks and funds," meaning, presumably, the 93,587l. 8s. 1d., "now form part of the Consolidated Fund."

This statement in the petition was the subject of some discussion during the argument, and Mr. Vaisey candidly

(1) [1911] 1 Ch. 502.

(2) [1928] Ch. 385; [1929] 1 Ch. 1.

(3) [1910] 1 K. B. 56.

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stated that it was not intended to suggest that the sum in question had ever been in any way earmarked so as to exist as a separate portion of the funds belonging to the Crown. The term "Consolidated Fund" is first to be found, I think, in the Exchequer and Audit Departments Act, 1866, s. 11, which provides that all moneys paid into the Bank of England and the Bank of Ireland on the account of the Exchequer shall be considered by the Governor and company of the said banks respectively as forming one general fund in their books and that all orders directed by the Treasury to the said banks for use out of credits to be granted by the Controller and Auditor-General as thereafter provided for the public service shall be satisfied out of such general fund; and s. 12 provides for quarterly accounts of the income and charge of "the Consolidated Fund" in Great Britain and in Ireland for such quarter. The Consolidated Fund, in fact, is no other than the great central account of His Majesty's Government into which ultimately passes the produce of taxes and other sources of income and from which round sums are issued to subsidiary accounts from which the actual drafts for the public services are met. In these circumstances it seems to be clear that (for the present purpose) the petition ought to be treated in the same way as an equitable claim brought by the next of kin of an intestate against a subject who has wrongly received part of the intestate's estate, pursuant to an order of the Court and without any notice of the plaintiff's title. It should, therefore, be added that by para. 18 of the petition it is stated that since shortly after the death of the intestate (over fifty years ago) the said William Leonard and the suppliant have from time to time endeavoured to obtain evidence in order to substantiate before His Majesty's Court the claim of the said William Leonard.

Assuming that such an action could, in the circumstances, be maintained in equity, the question arises whether the Statute of Limitations could be successfully pleaded in answer to the claim either as directly applicable, or as applicable in a Court of equity by way of analogy. It is to be observed that the person to whom the property was paid, either

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pursuant to the order of the Court, or simply by a mistake of the administrator, would clearly not be an express trustee for the rightful owner; for even the administrator is not an express trustee: *In re Lacy*. (1)

If the property transferred by the administrator had been in the form of securities still retained by the defendant there would, perhaps, have been no difficulty about the action apart from the question of lapse of time: *Brooksbank v. Smith* (2); *In re Robinson*. (3) In *Brooksbank v. Smith* (2) the trustees of the will of Elizabeth Brane had by mistake transferred a sum of stock to the defendant who still retained 100*l.* of such stock which the plaintiffs identified as the residue of the stock transferred. Alderson B. held that it was a case where the Statute of Limitations was not applicable since the mistake was first discovered within six years before the filing of the bill. The case is explained in *Baker v. Courage & Co.* (4), where Hamilton J. points out that where a party had not the means of knowing the truth, equity would not consider laches to be attributable to him, and, therefore, the equitable period of limitation would not run against him. But the judgment in *Brooksbank v. Smith* (2) certainly tends to show that in such a case the Statute of Limitations, that is the Statute of James, would be a defence by way of analogy after six years from the time when the mistake was first discovered.

It may be desirable to add a few words on the question of principle. The right to follow trust funds into the hands of a volunteer is an equitable right which at the highest cannot be based on a principle more favourable to the cestui que trust than would be involved in the contention that the volunteer is a constructive trustee for the owner. Constructive trusts are of various kinds, and without attempting a classification I may point out that there is a wide difference from the point of view of the effect of lapse of time between cases where the constructive trustee must be taken to have knowingly assumed the obligations of a trustee and those where the

(1) [1899] 2 Ch. 149.

(3) [1911] 1 Ch. 502.

(2) 2 Y. & C. Ex. Eq. 58.

(4) [1910] 1 K. B. 56, 63.

relationship is due merely to equitable principles. In the case of *Soar v. Ashwell* (1) (taking that case as an excellent example) the solicitor to trustees of a will who had received the moneys due under a mortgage belonging to the trust was assumed to act as trustee of the funds which he received; and being, therefore, bound under a direct trust to the cestuis que trustent, could not rely upon lapse of time. But where the constructive trust is one in which an equitable obligation arises from the circumstances of the case, and there has been no intention to create a trust, and no improper conduct in relation to trust property from which the Court will infer a direct trust, there is in general no objection to the defendant appealing to the lapse of time (see *Friend v. Young* (2) where Stirling J. distinguishes the case of *Burdick v. Garrick* (3)). The same view was taken by Lord Macclesfield in the case of *Lockey v. Lockey* (4); and an elaborate judgment of Lord Redesdale in *Hovenden v. Lord Annesley* (5) is to the like effect.

To avoid misconception I repeat that I am not considering cases where trust moneys have been received with the full knowledge that they are subject to a trust. In such a case the person receiving the money puts himself in the same position as an express trustee: *Soar v. Ashwell* (1); *In re Eyre-Williams*. (6) Nor am I dealing with a case of fraud.

On the hypothesis on which I have to deal with the present case, I have come to the conclusion that there would be nothing to prevent a subject from raising the lapse of time as a bar, and, at the best for the claimant, a lapse of six years from the date of the discovery of the mistake, would, in my opinion, be a complete answer to the claim.

In the above observations I have assumed that there is a right to follow trust funds; but the sum ordered to be transferred by the order of June 23, 1883, was a sum of money—namely, 93,587*l.* 8*s.* 1*d.* subject to costs. The old doctrine as to the impossibility of following money into the hands of a volunteer has been largely encroached upon by more

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(1) [1893] 2 Q. B. 390.

(2) [1897] 2 Ch. 421, 431, 432.

(3) (1870) L. R. 5 Ch. 233.

(4) (1719) Pr. Ch. 518.

(5) 2 Sch. & Lef. 607, 632.

(6) [1923] 2 Ch. 533.

MAUGHAM modern decisions, especially in cases where the trustee is the defendant. I have, however, been unable to find any case in which a claim to follow money in the hands of a volunteer (not being the original trustee or his bankers) has been successfully made, and I doubt whether, at any rate when the money is paid over pursuant to an order of the Court, such an action would lie quite apart from lapse of time, and this apart, also, in such a case as the present from the operation of the rule in *Clayton's Case*.⁽¹⁾

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A petition of right similar in some respects to the present petition was brought in the case already referred to of *In re Mason*.⁽²⁾ The decision of Romer J., as he then was, dismissing the petition, was affirmed by the Court of Appeal; and I might, perhaps, have placed more reliance on that decision in the present case than I have done. It appears, however, that the facts in that case differed from the facts of the present case by reason of the circumstances that the Crown had not retained the property, but had granted the personal estate and effects of the intestate (subject to payment of a percentage on the value for His Majesty's use) to certain third persons. Accordingly the suppliant there was unable to assert (except as regards the commission) that any of the property remained in the hands of the Crown; and the claim for the amount of the commission does not seem to have been separately urged. I would, however, observe that there are a number of observations in the judgments of Romer J. in the Court of first instance, and of the Master of the Rolls and Lawrence L.J. in the Court of Appeal, which tend to support the views which I have expressed.

The question raised by the demurrer must, therefore, be determined in favour of the Crown and the petition accordingly dismissed.

Petition dismissed.

Solicitors: *Ward, Bowie & Co., for Booth & Co., Leeds; Treasury Solicitor.*

(1) (1816) 1 Mer. 572.

(2) [1928] Ch. 385; [1929] 1 Ch. 1.

In re HEALTH PROMOTION, LIMITED.MAUGHAM
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[No. 00413 of 1931.]

1931
July 17.

Company—Winding Up—Authors and Publishing Company—Agreements for Right to Publish Books—Copyright of some Books in Company, of others in Authors—Royalties—Winding Up of Company—Sale by Liquidator of Business and Assets, including Books—Right of Liquidator to Sell Books—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 60—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 262.

Sect. 60 of the Bankruptcy Act, 1914, does not apply in the winding up of an insolvent company.

Two authors entered into agreements with a publishing company for the exclusive right to print and publish certain books written by them. The copyright in some of the books was to go to the company, in others, to remain to the authors: and royalties were payable to the authors as in the agreements provided. The company went into voluntary liquidation, and the liquidator sold its assets, including copies of the books: and it was agreed by a later agreement between him and the purchaser that nothing in the agreement should prejudice the purchaser's right to sell them. The company became insolvent. On a summons to determine whether, where the copyright or some interest in it was vested in the company at the date of the resolution to wind up, the sale was subject to s. 60 of the Bankruptcy Act, 1914, and whether, where the copyright was not then vested in the company, the consent of the authors was necessary to the sale:—

Held, that s. 60 of the Bankruptcy Act, 1914, is not incorporated in s. 262 of the Companies Act, 1929, and therefore did not apply to the rights of the authors.

Henham v. Alston Rivers, Ltd. (1916) Macgillivray, Copyright Cases, 1911-16, 330, considered and distinguished.

ORIGINATING SUMMONS.

Health Promotion, Ltd. (hereinafter called "the company"), carried on the business of publishers. The company entered into agreements with Joseph J. Warshaw and Walter M. Gallichan for the exclusive rights of printing and publishing certain books written by them. Every agreement provided that the company should have the sole right of publishing the book and should publish it at its own expense and risk; some of the agreements provided that the company should pay to the author or his heirs or assigns a royalty of a fixed amount upon every copy

MAUGHAM sold, and that subject to the agreement the whole right, title
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and interest in the manuscript and the copyright of the book should remain in the author; others, that the copyright should remain in the publishers; and one, that no royalties should be payable to the author on the first ten thousand copies sold.

By a resolution passed at a meeting of the shareholders of the company on July 25, 1930, Herbert Lewis Gray (hereinafter called "the liquidator") was appointed liquidator in the voluntary liquidation of the company, and was on the same date appointed liquidator of Lutterworths, Ltd., a company carrying on a like business. The company was insolvent.

By an assignment dated September 11, 1930, and made between the company and Lutterworths, Ltd., of the first part, the liquidator of the second part, and Lewis Jackson of the third part, in consideration of 1100*l.* paid by Lewis Jackson to the liquidator, the liquidator assigned the whole business of the company and the business of Lutterworths, Ltd., to Lewis Jackson. The purchase price was apportioned as between the company and Lutterworths, Ltd., as to the sum of 800*l.* in respect of the assets sold by the company and as to 300*l.* in respect of the assets sold by Lutterworths, Ltd. Among the stock in trade and assets of the company delivered to Lewis Jackson in pursuance of the agreement were certain printed and bound copies of books written by Joseph Warshaw and of others written by Walter M. Gallichan. They were part of the stock in trade of the company at the date of the sale to Lewis Jackson.

By a supplemental agreement dated January 20, 1931, and made between Lewis Jackson of the one part and the liquidator of the other part, it was provided that nothing therein contained should prejudice the rights of Lewis Jackson to sell or otherwise dispose of the copies of the books which he had acquired under or by virtue of the assignment of September 11, 1930.

This summons was issued on May 22, 1931, upon the application of the liquidator for the decision (*inter alia*) of the

questions: (1.) whether in any case in which by agreement with the respondents Warshaw or Gallichan, or either of them, the sole right of printing and publishing any of certain works mentioned in the schedule to the summons was vested, together with the copyright or some interest in the copyright of that work, in the company at the date of the resolution for its voluntary winding up, the liquidator was entitled to dispose of the benefit of that agreement and that copyright or interest in copyright and copies of the work to which that agreement related free from, or only upon and subject to, the terms of s. 60 of the Bankruptcy Act, 1914 (1); and (2.) Whether, in any case in which under any such agreement as aforesaid the sole printing and publishing rights of any work were vested in the company at that date without there being vested in the company the copyright in the work to which that agreement related, the liquidator was entitled to assign the benefit of that agreement to a purchaser so as to confer the benefit of it upon that purchaser without the consent of the respondents Warshaw and Gallichan.

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Braund for the liquidator.

H. S. G. Buckmaster for the respondents Warshaw and Gallichan. Sect. 262 of the Companies Act, 1929 (2), incorporates s. 60 of the Bankruptcy Act, 1914. Mr. Warshaw and

(1) Sect. 60: "Where the property of a bankrupt comprises the copyright in any work or any interest in such copyright, and he is liable to pay to the author of the work royalties or a share of the profits in respect thereof, the trustee shall not be entitled to sell, or authorise the sale of, any copies of the work, or to perform or authorise the performance of the work, except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt, nor shall he, without the consent of the author or of the court, be entitled to assign the right or transfer the interest or to grant any interest in the right by licence, except upon terms which will secure to the

author payments by way of royalty or share of the profits at a rate not less than that which the bankrupt was liable to pay."

(2) Sect. 262: "In the winding up of an insolvent company registered in England the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in England with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the

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Mr. Gallichan are therefore entitled to payment in full of the royalties payable to them under their agreements with the company. In the case of *Henham v. Alston Rivers, Ltd.* (1) Younger J. decided that s. 60 of the Bankruptcy Act, 1914, protected the author in the case before him, whom it entitled, despite the liquidation of the company, to full payment of the royalties agreed upon. The report states that the section "was enacted at the instance of the Society of Authors and was intended to protect authors against the disastrous consequences of the decision" in *In re Grant Richards*. (2) In that case Bigham J. decided that the claim of the applicant (an author) against the trustee in bankruptcy of the publisher must be limited to the damages which he had sustained by the breach of his agreement with the publisher. It is submitted that if it be held in the present case that s. 262 of the Companies Act, 1929, does not incorporate s. 60 of the Bankruptcy Act, 1914, the disadvantage of authors will be as great as it was after the decision in *In re Grant Richards* (2) and before the enactment of the section.

C. Gallop for the respondent Jackson.

MAUGHAM J. I shall not trouble counsel further in this matter, in which I think that I must decide that s. 262 of the Companies Act, 1929, does not, according to its true construction, incorporate s. 60 of the Bankruptcy Act, 1914. I think that counsel for the authors has said all that can properly be said in favour of the view that the section of the Bankruptcy Act is incorporated; but when I look at the words of s. 262 of the Companies Act, 1929, I am quite unable to see how s. 60 of the Bankruptcy Act can be incorporated. To my mind, s. 60 is a limitation of the trustee's powers, and confers, except so far as benefits may be gained by such a limitation, no direct benefit upon any author at all. In substance it provides as follows: that where the property of a bankrupt comprises copyright winding up, and make such claims against the company as they respectively are entitled to by virtue of this section."

(1) Macgillivray's Copyright Cases, 1911-16, 330.

(2) [1907] 2 K. B. 33.

or interest in some copyright, and payment for the copyright was to be made by payment to the author of royalties, the trustee in bankruptcy is not to be entitled to sell any copies of the work except upon terms of paying to the author the sums by way of royalty which would have been payable by the bankrupt. Secondly, it provides that in such case he shall not, without the consent of the author or of the Court, be entitled to assign the copyright or to transfer the interest in the copyright or to grant any interest in the copyright by way of licence except upon terms which would secure to the author the royalties for which he had stipulated. All those provisions are, as I have said, restrictions upon the right of the trustee, and accordingly I think that it is true to say that s. 60 is not a section which confers a right upon an author as a creditor or as an unsecured creditor of the bankrupt. It is clear, then, to my mind, that the phrase, "with regard to the respective rights of secured and unsecured creditors and to debts provable," in s. 262, is not wide enough to incorporate s. 60 of the Bankruptcy Act, 1914; nor do I think that the section can possibly come within the words by reason of a reference to future and contingent liabilities. There are no future or contingent liabilities in regard to which s. 60 can be fairly described as a rule relating thereto. I should add that the section, from the time when it was first introduced in the Act of 1875, has been strictly construed, and anyone who looks at Buckley on the Companies Acts, 11th ed., p. 533, will see how numerous are the cases in which it has been held that the section does not introduce into a winding-up bankruptcy rules in relation to a number of matters.

Counsel for the authors has relied on *Henham v. Alston Rivers, Ltd.*, the effect of which is stated in Macgillivray's Copyright Cases, 1911-1916. It is, however, to be noted that that was a case which came before the Court on a motion for judgment in default of appearance on the defendant's behalf, and that, although s. 60 of the Bankruptcy Act is referred to, I can find no reference whatever to the incorporating section in the Companies Act then in force—namely,

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MAUGHAM s. 207 of the Companies (Consolidation) Act, 1908; nor do I
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 HEALTH find that the learned judge ever dealt with or considered
 PROMOTION, that matter. Accordingly, I cannot accept the statement
 LD., in *Henham v. Alston Rivers, Ltd.*, as authority for the view
 In re. that s. 60 of the Bankruptcy Act is a rule applicable to the
 — winding up of an insolvent company. I am constrained to
 hold that the rights of the parties in the matters referred
 to in the summons are to be decided without reference to
 s. 60 of the Bankruptcy Act, 1914.

Solicitors: *Field, Roscoe & Co.; Lazarus, Son & L. A. Hart;*
Forsythe & Kerman.

K. R. A. H.

MAUGHAM
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In re KATHERINE ET CIE, LIMITED.

1931
 July 29, 30.

[No. 00484 of 1931.]

*Company—Winding Up—Leasehold Property of Company—Application by
 Liquidator for Leave to Disclaim Leasehold Property—Objection by Lessors
 —Discretion of Court—Companies Act, 1929 (19 & 20 Geo. 5, c. 23);
 ss. 267, 296.*

Where the liquidator of a company applies for leave to disclaim leasehold property of the company, the Court, in exercising its discretion, may take into consideration the effect of the disclaimer on interested parties.

The liquidator of a company holding a lease applied for liberty to disclaim the lease. The lessors, who were relying on certain guarantors for the payment of the rent and performance of the covenants, opposed the application, on which the Registrar made no order save as to payment of costs. On a motion before the Court by way of appeal:—

Held, that, as the lessors, who were entitled to appear, would suffer substantial injury if the disclaimer were allowed, the Court, in the exercise of its discretion, would not allow it.

Ex parte Buxton (1880) 15 Ch. D. 289 considered.

Ex parte East and West India Dock Co. (1881) 17 Ch. D. 759 considered and distinguished.

MOTION.

By a lease (hereinafter called “the lease”), dated June 1, 1928, and made between Charles Frederick Coni and Alfred Newell Golding Coni (hereinafter called “the lessors”) of the

one part and Katherine et Cie, Ltd. (hereinafter called "the company") and Katherine Helen Adamson and Helen Myrtle Dorothy Kellett (hereinafter called "the guarantors") of the other part, the lessors demised certain premises to the company for the term of eight and a-quarter years from March 25, 1928. In the lease the guarantors, in consideration of the acceptance by the lessors at their request of the company as tenant of the premises demised by the lease jointly and severally guaranteed the punctual and faithful observance and performance by the company of the covenants and conditions in the lease contained and the payment of the rent thereby reserved at the times therein prescribed; and also jointly and severally undertook to be responsible to the lessors as sureties for the company for the payment by the company of all the sums of money, costs, damages and expenses that might become due to the lessors from the company by reason of the company's having become the tenant of the lessors under the lease.

On January 9, 1931, a resolution was passed by the company for voluntary winding up and for the appointment as liquidator of Edgar Joseph Grande (hereinafter called "the liquidator").

By an originating summons taken out on June 23, 1931, the liquidator applied for an order that he be at liberty to disclaim the lease. The lessors opposed the application. The Registrar made no order on the application, except that the liquidator should pay to the lessors and to Helen Myrtle Dorothy Kellett their respective costs of the application.

On July 29, 1931, a motion came before the Court, on behalf of the liquidator, by way of appeal against the decision of the Registrar.

C. N. Tindale Davis for the liquidator. As to the effect of the dissolution of a company upon a lease, s. 296 of the Companies Act, 1929, creates a situation quite different from that which obtained before the passing of the Act. (1)

(1) Sect. 296: "Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property

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MAUGHAM *Hastings Corporation v. Letton* (1) was a case in which it was held that, on the dissolution of a company, the reversion to a lease held by the company was accelerated and the lease was at an end. In bankruptcy the trustee becomes a statutory assignee, and the property vests in him upon the adjudication, but he can always free himself from personal liability by assigning over to a pauper. The bankrupt is personally free from all his obligations, and the only remedy that the landlord has against him is one of proof. [He referred to s. 30 of the Bankruptcy Act, 1914; and to *Hardy v. Fothergill*. (2)] In arriving at the debt provable and at the liability existing at the date of the order, future as well as past debts must be taken into consideration. No doubt as to what is a provable and what a contingent debt can possibly ever arise after discharge, save that a debt provable after discharge can be revived by new consideration: *Wild v. Tucker*. (3) So long as the lease is outstanding the liquidator in the present case cannot conclude his liquidation. No consideration must be given to the question how it is going to affect third persons, who have their remedies in a proof. In every case of bankruptcy or liquidation the creditor loses his personal remedy, and the only remedy then is one of proof: *In re Finley* (4); *Stacey v. Hill*. (5) The same rules ought to prevail in Companies Winding Up as in Bankruptcy, and the Registrar was not right in taking into consideration the question whether the company is solvent or insolvent or the question whether the claim affects third persons.

McCrindle for the respondents. The Registrar was right. In *Ex parte East and West India Dock Co.* (6) the objectors

held by the company on trust for any other person) shall, subject and without prejudice to any order which may at any time be made by the court under the two last foregoing sections of this Act, be deemed to be bona vacantia and shall accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case

may be, and shall vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall."

(1) [1908] 1 K. B. 378.

(2) (1888) 13 App. Cas. 351.

(3) [1914] 3 K. B. 36.

(4) (1888) 21 Q. B. D. 475.

(5) [1901] 1 Q. B. 660.

(6) 17 Ch. D. 759.

were third parties. In the present case they are not third parties, but interested parties. On the question of rent *Stacey v. Hill* (1) makes it quite clear that no rent can accrue. Under the Companies Act, 1929, there is no personal liability on the liquidator, and any personal liability on any one concerned is bound to come to an end when the liquidation is concluded. Under the Bankruptcy Act, 1914, the liability of the liquidator is personal, and the only way in which he can get rid of it is by assigning to the bankrupt.

Tindale Davis in reply. In view of s. 296 of the Companies Act, 1929, *Hastings Corporation v. Letton* (2) is no longer law. The whole point of that case was that the reversion was accelerated by virtue of the dissolution.

MAUGHAM J. [having stated the facts:] The company is insolvent, and the lessors, who have the benefit of a substantial guarantee so long as the lease is subsisting, object to leave being granted to the liquidator to disclaim the lease. If leave is granted the lease will be at an end, and in *Stacey v. Hill* (1) it has been held that where the trustee in bankruptcy of a lessee disclaims the lease, the term is determined as between the lessor and the lessee, and therefore, since no rent can subsequently accrue due under the lease from the lessee, the guarantors of the rent are freed from further liability. The lessors say that the result of the disclaimer if allowed would be a loss of some thousands of pounds. If the lease is not disclaimed, the lessors can prove for rent and can enter and claim for future rent and breaches of covenant: *In re Panther Lead Co.* (3) If disclaimer takes place they may prove in the liquidation as a debt to the amount of the injury sustained. The anticipated dividend is of small amount.

The disclaimer section of the Companies Act, 1929, is s. 267. (4) It is new and reproduces with modifications

(1) [1901] 1 Q. B. 660.

(2) [1908] 1 K. B. 378.

(3) [1896] 1 Ch. 978.

(4) Sect. 267, sub-s. 1: "Where any part of the property of a company

which is being wound up consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that

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s. 54 of the Bankruptcy Act, 1914. Before the coming into force of the Companies Act, 1929, there was no right of disclaiming property, however onerous, in the winding up of a company. There are, however, differences between the sections applicable in the case of the liquidation of a company and in the case of a bankruptcy. The former case differs from that of a bankruptcy, especially in this respect, that the winding up of a company does not effect a *cessio bonorum*, and that the property of the company remains vested in the company as before; whilst in a bankruptcy the property of the bankrupt vests in the trustee. It follows that a trustee in bankruptcy, if he does not disclaim the property, is or may be personally liable, whereas in the liquidation of a company property not disclaimed by the liquidator remains vested in the company and the liquidator does not incur the smallest liability.

is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the court, disclaim the property:

Provided that, where any such property has not come to the knowledge of the liquidator within one month after the commencement of the winding up, the power under this section of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof, or such extended period as may be allowed by the court."

Sub-s. 2: "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest, and liabilities of the company . . . in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights or liabilities of any other person."

Sub-s. 3: "The court, before or on granting leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the court thinks just."

Sub-s. 4: "The liquidator shall not be entitled to disclaim any property under this section in any case where an application in writing has been made to him by any persons interested in the property requiring him to decide whether he will or will not disclaim, and the liquidator has not, within a period of twenty-eight

It should be observed that s. 267 of the Companies Act, 1929, requires the leave of the Court, and that it is a new provision. Companies have been wound up ever since 1862 without such a section, and without any very serious difficulty. It is I think clear that the leave of the Court may be refused, and that the matter is really one for the discretion of the Court to be exercised on legal grounds. Counsel for the liquidator, in his admirable argument, has frankly faced the point and has contended that the reason why, in the present case, the Court cannot properly refuse to consent to a disclaimer is because the interests of the liquidation are paramount, and accordingly the Court has no right to consider whether the operation of a disclaimer will affect

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days after the receipt of the application or such further period as may be allowed by the court, given notice to the applicant that he intends to apply to the court for leave to disclaim, and, in the case of a contract, if the liquidator, after such an application as aforesaid, does not within the said period or further period disclaim the contract, the company shall be deemed to have adopted it."

Sub-s. 5: "The court may, on the application of any person who is, as against the liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up."

Sub-s. 6: "The court may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged by this Act in respect

of any disclaimed property and on hearing any such persons as it thinks fit, make an order for the vesting of the property in or the delivery of the property to any persons entitled thereto, or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the court thinks just, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose:

Provided that, where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the company, whether as under-lessee or as mortgagee by demise, including a chargee by way of legal mortgage, except upon the terms of making that person—

- (a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the

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the interests of third parties. He bases his contention on *Ex parte East and West India Dock Co.* (1), but it is to be remembered that at the time of that decision the Bankruptcy Act, 1869, was in force, and that it differs widely from the more modern Bankruptcy Acts. Also, in that case, the objection to disclaimer was made by persons who had no rights as such in the administration and who were persons only indirectly interested in it. It appears from the facts that the disclaimer in that case was opposed by certain mortgagees who, it was suggested, would not be affected by the bankruptcy, and by original landlords who had no claim against the bankrupt's estate, inasmuch as the original lease had been assigned to the bankrupt. Lord Selborne L.C. observed (2): "On the face of the section" (i.e., s. 23 of the Bankruptcy Act, 1869) "it appears to us that the power given by it is to be exercised with a view to the administration in bankruptcy of the bankrupt's estate, and for the benefit of all the persons interested in that administration. Therefore, if in a particular case it appears clear that, looking at that object alone, the disclaimer ought to be allowed, the Court would be introducing considerations foreign to the

commencement of the winding up; or

- (b) if the court thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date;

and in either event (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and, if there is no person claiming under the company who is willing to accept an order upon such terms, the court shall have power to vest the estate and interest of the company in the property in

any person liable either personally or in a representative character, and either alone or jointly with the company to perform the lessee's covenants in the lease, freed and discharged from all estates, incumbrances and interests created therein by the company."

Sub-s. 7: "Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the injury, and may accordingly prove the amount as a debt in the winding up."

Sub-s. 8: "This section shall not apply in the case of a winding up in Scotland."

(1) 17 Ch. D. 759.

(2) Ibid. 759, 764.

purpose of the Legislature if, for collateral reasons connected with the position of other persons, it should refuse to allow it. . . .” That dictum, however, does not apply to the objections of landlords with a right of proof. I must further bear in mind that the Court of Appeal, still dealing with the Bankruptcy Act, 1869, had only a few months before, in *Ex parte Buxton* (1), taken a view which is not easily reconcilable with that of Lord Selborne. There, a lease had been granted to one Muller who, on his bankruptcy, had deposited it with one S. C. Buxton as security for the repayment of moneys which Buxton had lent to him. There was apparently only a deposit of the lease, and the mortgage was therefore an equitable mortgage. The trustee in the bankruptcy of Muller desired to disclaim the lease, and the effect of the disclaimer would have been to destroy Buxton’s security. Buxton opposed the disclaimer, and ultimately the question for decision was whether he should enter into a covenant of indemnity as an assignee. He insisted that he was not bound to indemnify the trustee in bankruptcy. By his notice of appeal the appellant asked that the trustee might be authorized and directed to assign all the interest acquired by him as trustee in the property comprised in the lease to Buxton.

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James L.J. said (2): “If the equitable mortgagee intercepts the trustee’s right to disclaim, a right which is given to him by statute subject to the equitable rights of other persons, he must, like any other person who claims the property, take it on the usual terms, i.e., he must covenant to indemnify the trustee against liability under the lease. The trustee will not get the benefit of a disclaimer; he will assign as a continuing lessee up to the time of the assignment, and as he will thus retain a liability which he would otherwise have got rid of, the assignee must indemnify the trustee against the consequences of his retaining the lease up to the date of the assignment.”

I am not sure that those two statements of the law are reconcilable. Williams on Bankruptcy, 13th ed., at p. 343,

(1) 15 Ch. D. 289.

(2) Ibid. 289, 291.

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says in reference to those two cases: "It was held, under the Act of 1869, that in determining whether leave should be given to a trustee to disclaim the Court ought to have regard only to the question whether the disclaimer will be for the benefit of the persons interested in the administration of the bankrupt's estate, and ought not to have regard to any collateral consideration, such as the injury which the disclaimer might occasion to third parties. (*Ex parte East and West India Dock Co.*, 17 Ch. D. 759.) This case seems inconsistent with the earlier case of *Ex parte Buxton*, 15 Ch. D. 289, where the Court seems to have thought that leave to disclaim ought not to be given to the prejudice of an equitable mortgagee if he was willing to take an assignment of the legal estate in the lease, and to give the trustee a proper and sufficient indemnity."

However that may be, it seems to me that the case of a disclaimer in a liquidation is very different from that of a disclaimer in a bankruptcy and, whatever may be the over-riding considerations which, in *Ex parte East and West India Dock Co.* (1), caused Lord Selborne to take the view that the injury of persons not directly interested ought not to be borne in mind, I see no reason why, exercising my discretion under s. 267 of the Companies Act, 1929, I ought not to consider matters of that kind. I would add that sub-s. 2, of s. 267, tends to show that disclaimer is not intended to affect the rights and liabilities of third persons. In my opinion the Court may properly balance the advantages and disadvantages of a disclaimer to be gained by the liquidator in the liquidation of the assets and by persons affected by the disclaimer.

It is true that the consequences of a dissolution have been changed since the year 1928, that is, since s. 296 of the Companies Act, 1929, came into force. [His Lordship read the section and continued:] Before that section came into force it had been held that on a dissolution a lease vested in the company came to an end and that the property reverted to the lessor: *Hastings Corporation v. Letton*. (2)

(1) 17 Ch. D. 759.

(2) [1908] 1 K. B. 378.

The fact that the property in the present case is now deemed to be bona vacantia does not affect the conclusion that the refusal of the Court to allow the disclaimer will not prejudice the liquidator in winding up the affairs of the company and concluding the liquidation in due course.

On the whole, having regard to the fact that the lessors (who are persons entitled to appear) will be very seriously injured, I exercise my discretion by refusing to allow this disclaimer and, consequently, I dismiss the appeal. I may add that it was a very proper matter to bring before the Court.

Solicitors : *Wingfields, Halse & Trustram ; Anstey & Co.*

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In re SUNNYFIELD.

[1931. S. 1281.]

Restrictive Covenants—No Building Scheme—Covenants not expressed to be for Benefit of Adjacent Land—No Right in Assignees of Adjacent Land to Enforce Covenants—Covenants no longer Effective—Declaration—Rectification of Register—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 84, sub-s. 2—Land Registration Act, 1925 (15 Geo. 5, c. 21), s. 82.

Where a conveyance of land never the subject of a building scheme contains restrictive covenants not expressed to be for the benefit of adjacent property or of a defined area and never passing by an assignment under which they can be enforced, the Court, in the exercise of its discretion under s. 84 of the Law of Property Act, 1925, and s. 82 of the Land Registration Act, 1925, may declare them no longer effective.

The applicant was the freeholder of premises which a predecessor in title, on buying them from the Ecclesiastical Commissioners, had covenanted for himself, his heirs and assigns, to use not otherwise than as a private residence and not for any purpose which, in the opinion of the surveyor for the time being of the Commissioners, might be or become injurious to the adjacent property of the Commissioners their successors or assigns. These restrictions were entered in the Charges Register at the Land Registry. The applicant, unable to sell the premises as a private residence, negotiated with persons willing to buy them if the restrictions could be proved no longer effective. So far as could be ascertained, the premises had never been the subject of a building scheme : the Commissioners no longer owned any property in the immediate neighbourhood ; and neither they nor their successors in title to properties

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adjacent to the premises claimed the right to enforce the restrictions. On a summons for a declaration, under s. 84, sub-s. 2, of the Law of Property Act, 1925, that no part of the premises was any longer affected by any of the restrictions, and for the cancellation of the entry of the restrictions in the Charges Register :—

Held, that, as there had never been a building scheme, and as the restrictions had never been expressly assigned or expressed to be for the benefit of adjacent property of the Commissioners or of any defined area near the premises, there was no one who could enforce the restrictions, which therefore no longer affected the premises.

Renals v. Cowlishaw (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866; *Rogers v. Hosegood* [1900] 2 Ch. 388; and *Reid v. Bickerstaff* [1909] 2 Ch. 305 followed.

ORIGINATING SUMMONS.

By a conveyance dated April 3, 1873, and made between the Ecclesiastical Commissioners of the one part and John Henry Dallmeyer of the other part (and hereinafter called “the conveyance”) land which at the date of this summons was comprised in freehold land and premises known as “Sunnyfield,” West Heath Road, Hampstead, was conveyed to the said John Henry Dallmeyer in fee simple. By the conveyance the said John Henry Dallmeyer entered into covenants (hereinafter called “the restrictions”) with the Ecclesiastical Commissioners and their successors that he his heirs or assigns would (inter alia) not erect on the piece of ground thereby conveyed more than four houses, and would not use the houses or allow them to be used otherwise than as private residences, or use the land or allow it to be used for any purpose which, in the opinion of the surveyor for the time being to the Ecclesiastical Commissioners, might be or become injurious to the adjacent property of the Ecclesiastical Commissioners their successors or assigns. The restrictions were entered in the Charges Register at the Land Registry on January 26, 1909. On October 16, 1924, Alexandrina Elizabeth Henrietta Menke (hereinafter called “the applicant”) bought “Sunnyfield.” For some time before May, 1931, the applicant had been trying to sell “Sunnyfield” as a private residence. Owing to its size and the cost of upkeep no private purchaser could be found, and two prospective purchasers negotiated for the purchase of it in two lots, but

only upon the footing that the restrictions should be proved to be no longer effective. Out of a total of eight owners of adjacent property deriving title under conveyances from the Ecclesiastical Commissioners, none claimed the right to enforce the restrictions, nor was that right claimed by the Ecclesiastical Commissioners, who, at the date of these negotiations for the sale of "Sunnyfield," had no land in its immediate neighbourhood; and after extensive inquiries no indication was found that "Sunnyfield" had ever been the subject of a building scheme. Accordingly, by this summons the applicant asked, by way of relief under s. 84, sub-s. 2, of the Law of Property Act, 1925, and s. 82 of the Land Registration Act, 1925, (i.) that it might be declared that no part of "Sunnyfield" was any longer affected by any of the restrictions; (ii.) alternatively that the nature and extent of the restrictions might be declared and whether the same were at the date of this summons enforceable and if so by whom; and (iii.) that the entry of the restrictions in the Charges Register at the Land Registry might be cancelled or amended.

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Gavin Simonds K.C. and *R. F. Roxburgh* for the applicant. Sect. 84 of the Law of Property Act, 1925, is designed to facilitate the development of land which has at some time been affected by restrictive covenants. [He referred to sub-ss. 2, 3, and 4. (1)] It is quite clear that, where land has

(1) Sect. 84, sub-s. 2: "The court shall have power on the application of any person interested—

Sub-s. 3: The Authority shall, before making any order under this section, direct such enquiries, if any, to be made of any local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries notices or other proceedings previously made, given or taken, the Authority may think fit.

(a) To declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument; or

(b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

Sub-s. 4: The Reference Committee mentioned in this section may

MAUGHAM still to be developed, it can never be certain that there may not be some one who will come forward and claim to be entitled to the benefit of restrictive covenants, thus holding up a scheme which may be for the public benefit. In the present case a declaration that the restrictions are no longer enforceable is sought. The applicant is not the original covenantor with the Ecclesiastical Commissioners. A covenant by an original purchaser can be enforced against his assign only if it was entered into for the benefit of land remaining in the possession of the covenantee seeking to enforce it: *Chambers v. Randall*. (1) The Court will be asked to infer that the Ecclesiastical Commissioners, in obtaining a restrictive covenant from the purchaser of "Sunnyfield," obtained it in order to protect land which they possessed. They do not now possess any land there. In the present case there is nothing upon which the owner of a house could found a claim to enforce a covenant entered into by a previous owner of "Sunnyfield" with a predecessor in title: *Reid v. Bickerstaff* (2); *Rogers v. Hosegood* (3); *Renals v. Cowlishaw*. (4) The facts in the present case do not disclose sufficient ground for the Court to decide that the owners for the time being of adjacent houses are entitled to enforce restrictive covenants entered into by a predecessor in title of the applicant.

W. F. Waite for the Ecclesiastical Commissioners. No claim to the benefit of the restrictions is made by the Ecclesiastical Commissioners, who take the view that they are not entitled to enforce them.

A. Andrewes-Uthwatt for an adjacent owner. No claim is made to enforce the restrictions.

make rules in relation to any applications to be made to the Authority under this section, and with the consent of the Treasury may prescribe the fees to be paid in connexion with any application to the Authority.

Sub-s. 10: In this section 'the Authority' means such one or more of the Official Arbitrators appointed for the purposes of the Acquisition of

Land (Assessment of Compensation) Act, 1919, as may be selected by the Reference Committee under that Act."

(1) [1923] 1 Ch. 149.

(2) [1909] 2 Ch. 305, 319.

(3) [1900] 2 Ch. 388, 407.

(4) (1878) 9 Ch. D. 125; (1879) 11 Ch. D. 866.

MAUGHAM J. [having stated the facts:] When such an order as this is asked for, the Court ought to make every effort to see that all persons who may wish to oppose the making of the order have the opportunity of being heard, stating their objections in argument before the Court, and inviting the Court to refuse to exercise its powers. In the present case, it seems that every effort has been made to give notice to all persons having a probable interest in the property, and accordingly I ought not to refuse to proceed to the hearing of the matter.

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The questions which I have to determine are, first, whether I can come to the conclusion that there never was a building scheme in the technical sense, under which purchasers from the Ecclesiastical Commissioners came under covenant to conform to the restrictions for the benefit of the estate in course of development; and, secondly, whether, assuming that there was no building scheme, the Ecclesiastical Commissioners are entitled, or any purchaser from them of land adjoining "Sunnyfield" is entitled to enforce the restrictions.

The case is one in which it would not have been unreasonable to require purchasers to enter into restrictive covenants so as to make the same the local law of the estate; but it is also one in which the Ecclesiastical Commissioners may have thought that there was no need to lay out the property as a building estate. The plots are of various sizes, some of them being very considerable in extent, and the Ecclesiastical Commissioners may have desired to retain the right to alter or vary, on sales by themselves, the nature of the restrictions which they wished to impose. Mr. Brian Clutton, a member of the firm of Messrs. Clutton, surveyors to the Ecclesiastical Commissioners, says, in paragraph 9 of his affidavit sworn in this case: "So far as can be ascertained the said land was never offered for sale by public auction and never laid out as a building estate." That is not conclusive, but it certainly tends to show that there was no building scheme. Further, an affidavit by the applicant's husband, who is acting for her during her absence abroad, states that neither

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he nor his wife's solicitors have been able to hear of or find any suggestion of a building scheme in the extensive inquiries which they have made nor in the numerous documents which they have examined. That also is negative evidence, but it supports the statements of Mr. Clutton, and shows that there is very great improbability of there ever having been a building scheme:

I need not do more than mention the name of one of the many cases relating to building schemes. *Reid v. Bickerstaff* (1) finally lays down the facts necessary to be established to enable the Court to come to the conclusion that there is a building scheme in the legal sense.

Bearing in mind the particular facts, and the statements made by judges in that and in other cases, I must draw the inference that in the present case there never was a building scheme affecting the property of which "Sunnyfield" forms part. The Ecclesiastical Commissioners no longer retain any property contiguous to "Sunnyfield," and do not themselves make any claim to enforce the restrictions. They take the view that there never was a building scheme.

The second question which I have to decide involves the inquiry whether the benefit of the restrictions can have passed to any of the adjoining purchasers from the Ecclesiastical Commissioners. It is well settled that, apart altogether from building schemes, restrictive covenants may in certain cases be enforced by successors in title of the original covenantees—e.g., if the benefit of the covenant has been expressly assigned by conveyance from the original covenantee, or if the covenant is expressed to be for the benefit of a parcel of neighbouring land purchased by a later purchaser, in which case the benefit passes even though the subsequent purchaser never knew of the covenant.

In the present case the conveyances produced show clearly that there is no express assignment of any kind under which the restrictions can be enforced, and it is also clear from the conveyances that the restrictions are not expressed to

(1) [1909] 2 Ch. 305, 319.

be for the benefit of the adjacent property of the Ecclesiastical Commissioners or of any defined area near "Sunnyfield."

In my opinion, it is settled law that, in the absence of an express assignment of a restrictive covenant such as is here in question, the purchaser of a piece of the adjoining land cannot claim the benefit of the restrictive covenant unless it appears that there is something in the deed containing the covenant to define the property for the benefit of which it was entered into, so that the person entering into the covenant becomes aware at the date of the deed of the persons who may in future enforce the covenant. The cases of *Renals v. Cowlishaw* (1); *Rogers v. Hosegood* (2); and *Reid v. Bickerstaff* (3) show that the benefit of a restrictive covenant cannot pass unless it is expressly assigned or is so annexed to the land as to pass by mere conveyance.

I therefore come to the conclusion that there is no person in a position to enforce the restrictions, and in the exercise of the statutory power I decide that "Sunnyfield" is not affected by them.

Solicitors: *Coward, Chance & Co.*; *Milles, Jennings White & Foster*; *Bird & Bird*.

(1) (1878) 9 Ch. D. 125; (1879)
11 Ch. D. 866.

(2) [1900] 2 Ch. 388.

(3) [1909] 2 Ch. 305.

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GILLEGHAN v. MINISTER OF HEALTH.

[1931. G. 560.]

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Crown—Crown Servant—Minister of Health—Incorporation for Limited Purpose—Immunity from being sued in Contract—Claim struck out—Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), ss. 1, 3, 7—Order xxv., r. 4.

An action in contract will not lie against the Minister of Health as such, if, although incorporated by statute, he is only incorporated for a limited purpose—i.e., acquiring and holding land.

Graham v. Public Works Commissioners [1901] 2 K. B. 781 and *Roper v. Public Works Commissioners* [1915] 1 K. B. 45 distinguished on this ground.

MOTION.

This was an action against the Minister of Health as such, for breach of contract. The defendant moved to strike out the claim under Order xxv., r. 4.

The plaintiffs, who sued on behalf of themselves and all other members of the Retail Pharmacists' Union and on behalf of themselves and all persons who had contracted to supply drugs and medicines to insured persons under the National Insurance Act, 1924, asked for a declaration that on the true construction of his agreement with them the defendant was not until December 31, 1932, entitled to alter the terms of contracts between the plaintiffs and Insurance Committees for the respective areas in which the plaintiffs carried on business, and an injunction accordingly.

The Minister of Health was established by the Ministry of Health Act, 1919, s. 1.

By s. 3, sub-s. 1, the powers and duties of (a) the Local Government Board and (b) the Insurance Commissioners were transferred to him.

Sect. 7, sub-s. 1, provides that the Minister "may sue and be sued by the name of the Minister of Health," and may for all purposes be described by that name.

Sub-s. 2 provides that the Minister shall have an official seal, which shall be officially and judicially noticed, and shall be authenticated by the signature of the Minister, or of a

secretary, or of any person authorized by the Minister to act in that behalf. FARWELL J.

Sub-s. 3 provides that "for the purpose of acquiring and holding land" the Minister for the time being "shall be a corporation sole" by the name of the Minister of Health, and all land vested in the Minister shall be held in trust for His Majesty for the purposes of the Ministry of Health. 1931 GILLEGHAN v. MINISTER OF HEALTH.

Sub-s. 4 provides that upon and by virtue of the appointment of any person to be Minister, the benefit of all deeds, contracts, bonds, securities, or things in action vested in his predecessor at the time of his predecessor ceasing to hold office shall be transferred to and vested in and enure for the benefit of the person so appointed, in the same manner as if he had been contracted with instead of his predecessor, and if his name had been inserted in all such deeds, etc., instead of the name of his predecessor.

The Minister was subsequently charged with certain duties in relation to the administration of medical benefit under the National Health Insurance Act, 1924 (14 & 15 Geo. 5, c. 38).

Sect. 24, sub-s. 5, provides that every insurance committee [constituted by s. 48] shall make arrangements for the supply of proper and sufficient drugs and medicines and prescribed appliances to insured persons in accordance with regulations, and the regulations made for the purposes of this sub-section shall provide for the arrangements made "being subject to the approval of the Minister."

Sect. 93, sub-s. 1, provides that regulations may be made (a) for any purpose for which regulations are expressly authorized to be made by any of the provisions of this Act; (b) for prescribing anything which under this Act is to be prescribed; and (c) generally for carrying this Act into effect.

Sub-s. 2 provides that all regulations made under this Act shall be laid before both Houses of Parliament as soon as may be after they are made, and "shall have effect as if enacted in this Act" subject to annulment by His Majesty in Council on an address of either House presented within the next twenty-one days on which that House has sat next after the regulation was laid before it.

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Sect. 132, sub-s. 1, provides that "Prescribed" means prescribed by regulations: "Regulations" means regulations made by the Minister under this Act; and "The Minister" means the Minister of Health.

Before August 1, 1927, the drugs, etc., were supplied and paid for at their full cost under the National Health Insurance (Medical Benefit) Consolidated Regulations, 1924, Sch. III. (S. R. & O., 1924, No. 1433, p. 898).

By letters of April 26 and May 11, 1927, the defendant invited the Retail Pharmacists' Union to agree to an alteration of those terms. The pharmacists were to accept the total liability for the drugs, etc., supplied in return for an allowance of 2s. 9 $\frac{3}{4}$ d. for each insured person, and the altered method of remuneration was to endure for six years from January 1, 1927, so as to give the pharmacists time to recoup possible losses.

By a letter of June 2, 1927, the Retail Pharmacists' Union agreed to the proposed alteration subject to a stipulation that every contract should contain a term forbidding any pharmacist to offer gifts or other inducements to insured persons to lead them to deal with him.

By letters of July 29, October 20, and November 18, 1927, the defendant agreed to this stipulation, and the term was subsequently embodied in the National Health Insurance (Medical Benefit) Consolidated Regulations, 1928 (S. R. & O., 1928, No. 965, p. 917).

Sch. III., Part I., s. 4, sub-s. 4, provides that "A chemist shall not give, promise or offer to any person any gift or reward (whether by way of a share of or dividend on the profits of the business or by way of discount or rebate or otherwise) as an inducement to or in consideration of his presenting an order for drugs or appliances on a prescription form provided by the Committee"—i.e., the Insurance Committee for any county.

The Minister now proposed to alter the regulations by deleting this paragraph and substituting a fresh provision in lieu thereof.

On March 3, 1931, the plaintiffs commenced this action, and delivered their statement of claim on April 2.

On May 12 the defendant issued a notice of motion to FARWELL strike out the statement of claim under Order XXV., r. 4, on the ground that it disclosed no reasonable cause of action, and to dismiss the action with costs.

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Sir William Jowitt A.-G. and Stafford Crossman for the defendant.

First, the plaintiffs cannot sue the Minister of Health in respect of his acts as a Crown servant. Their only remedy is by petition of right against the Crown: *Hosier v. Derby (Earl)*. (1)

The provision that the Minister "may sue and be sued by the name of the Minister of Health" is only for convenience of pleading. It does not give a right of action where none exists: *Rowland v. Air Council* (2); *Rowland & Kennedy v. Air Council* (3); *Mackenzie-Kennedy v. Air Council* (4), an action in tort.

Secondly, the alleged contract is ultra vires. No Minister can contract so as to fetter his statutory duty of making regulations, which by s. 32, sub-s. 3, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), includes a power to vary them: *Ayr Harbour Trustees v. Oswald* (5); *York Corporation v. Leatham*. (6)

[FARWELL J. Suppose the Minister purports to bind himself not to alter them for a limited time?]

He cannot bind his successors as to his legislative powers. Possibly he might fetter his administrative powers. But the plaintiffs' remedy would still be by petition of right only: see also *Brown v. Dagenham Urban Council* (7) and *Southport Corporation v. Birkdale District Electric Supply Co.* (8)

Thirdly, no consideration for the contract is alleged.

Galbraith K.C. and H. Glyn-Jones for the plaintiffs. This case raises a question of general importance and ought to go

(1) [1918] 2 K. B. 671. (4) [1927] 2 K. B. 517, 524, 526,

(2) [1923] W. N. 64; 39 Times 528, 531-535.

L. R. 228.

(5) (1883) 8 App. Cas. 623.

(3) (1925) 41 Times L. R. 545;

(6) [1924] 1 Ch. 557.

(1927) 96 L. J. (Ch.) 470, 473.

(7) [1929] 1 K. B. 737, 745.

(8) [1925] Ch. 63, 794, 814, 820, 822; [1926] A. C. 355, 364-366.

FARWELL to trial. The defendant can raise any point of law in his pleadings, and have it determined under Order xxv., rr. 2, 3. But to stop an action like this in limine under r. 4 is almost unthinkable: *Dyson v. Attorney-General*. (1)

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In *Rowland v. Air Council* (2) Russell J. on February 21, 1923, determined the case on a similar preliminary point of law, but on April 23 the Court of Appeal (3), without expressing any opinion on that point, discharged the order and directed the action to go to trial. The case was then heard on all points by Lawrence J. (4) and the Court of Appeal (5), who, with all the pleadings and facts before them, no doubt concurred with Russell J.'s view on the preliminary point.

The Minister is now clothed with the powers and duties of the Local Government Board, and any pending action against that Board would now be carried on against the Minister under the 1919 Act, Sch. I. Surely he could not object to be sued in this Local Government Board capacity, any more than the Local Government Board itself formerly objected. See, for instance, *Donahoo v. Local Government Board*. (6)

Hosier v. Derby (Earl) (7) was an ordinary action against a servant of the Crown who was not a corporation. Similarly, as pointed out by Russell J. in *Rowland v. Air Council* (2), the Air Council was not a corporation.

But where a Crown servant is a corporation an action in contract, though not in tort, will lie against that corporation: *Graham v. Public Works Commissioners* (8); *Roper v. Public Works Commissioners*. (9)

The second point is that the Minister cannot fetter his statutory power of making regulations. But surely his right to break his contract under the guise of altering the

(1) [1911] 1 K. B. 410, 414, 418, 420, 423.

(2) [1923] W. N. 64; 39 Times L. R. 228.

(3) [1923] W. N. 122; 39 Times L. R. 455.

(4) 41 Times L. R. 545.

(5) 96 L. J. (Ch.) 470, 473.

(6) (1882) 46 L. T. 300.

(7) [1918] 2 K. B. 671.

(8) [1901] 2 K. B. 781.

(9) [1915] 1 K. B. 45.

regulations is a difficult question of law that ought to be determined at the trial: *Nireaha Tamaki v. Baker*. (1)

The third point is otiose. The consideration speaks for itself.

Stafford Crossman in reply. The first point is concluded by *Hosier v. Derby (Earl)* (2), where identically similar arguments were advanced and rejected. See also *Murray v. Secretary of State for India in Council*. (3)

[FARWELL J. Here the Minister is a corporation sole.]

Only "for the purpose of acquiring and holding land." There was no general incorporation, as in *Graham's* case. (4)

Galbraith K.C. in rejoinder. The suggested distinction raises a very difficult question of law, which ought not to be decided without full argument at the trial.

FARWELL J. [after stating the facts and pointing out that it was not the practice of the Court to stop actions in limine under Order XXV., r. 4, unless satisfied that the action could under no possibility succeed, continued:]

I may dispose at once of the Attorney-General's third point—namely, that the statement of claim disclosed no consideration for the contract. If that were his only ground it would be quite plain that I could not make the order asked. I do not imagine this motion would have been launched on that ground alone. That would be a matter for the trial.

His second point is of much greater general importance. He says that the Minister being empowered by his Act to make regulations could not have contracted in such a way as to prevent himself subsequently making any regulations he thought fit, even though in apparent breach of his previous contract. In other words, he could not contract in such a way as to fetter his Parliamentary powers, and any action seeking to enforce such a contract would be hopeless and incapable of success.

I do not think it would be right for me to stay this action on that ground, nor to express any view at all as to its value

(1) [1901] A. C. 561, 576.

(2) [1918] 2 K. B. 671.

(3) [1931] W. N. 91.

(4) [1901] 2 K. B. 781.

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FARWELL as a defence. If that were the only ground for the motion, I think that the defendant should put in a defence, and that the plaintiffs should have an opportunity of considering the defence, and if necessary having any preliminary question of law determined. It would not be right to stop the action in limine on that ground alone.

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The Attorney-General's first point is however the crux of the matter. Will an action lie against a Minister of the Crown in respect of an act admittedly done as a Minister of the Crown? Or is the true view that the only remedy is against the Crown by petition of right?

The plaintiffs did not deny that as a general principle, unless there is express provision in the Act of Parliament regulating the matter, no action will lie against a servant of the Crown for any act done by him as such servant. Any relief must be sought against the Crown in appropriate proceedings.

The plaintiffs do not challenge this proposition, nor do I think they could possibly do so. But they say that in this particular case other considerations apply. They contend that as s. 7, sub-s. 1, of the 1919 Act expressly provides that the Minister "may sue and be sued by the name of the Minister of Health" and may for all purposes be described by that name, and as sub-s. 3 also makes him a corporation sole, he is liable to be sued in contract. For that proposition they rely on certain authorities which I will mention later.

Now the provision in s. 7, sub-s. 1, that the Minister "may sue and be sued by the name of the Minister of Health" does not give them any right of action. That has been determined by decisions binding on me. The matter has been considered (inter alia) in *Rowland & Kennedy v. Air Council* (1), where the Act constituting the Air Council contains a section in the precise terms of s. 7, sub-s. 1. Russell J., Lawrence J., and the Court of Appeal all held that a provision of that sort did not take the case out of the general rule or entitle a subject to sue the Minister for the matters of which the subject

(1) [1923] W. N. 64; (1925) 41 Times L. R. 545; (1927) 96 L. J. (Ch.) 470, 473.

complains, but any relief must be sought against the Crown FARWELL J. by appropriate proceedings.

The plaintiffs, however, say that those cases create no difficulty in their way here, because the Minister is made a corporation sole. They rely on Phillimore J.'s judgment in *Graham v. Public Works Commissioners* (1), holding that the fact that a Minister was a body constituted by Act of Parliament and made a corporation sole was enough to take the case out of the ordinary rule. In that case the Divisional Court, Ridley and Phillimore JJ., were unanimous in their decision, but their reasons were very different. Phillimore J. held that the fact that the Act made the Minister a corporation sole might be sufficient to enable the aggrieved subject to sue him, but that was not the ground of the decision of Ridley J.

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That decision was followed in *Roper v. Public Works Commissioners*. (2) Shearman J. said: "Now as to whether being servants of the Crown, although created a corporation to all intents and purposes by the Works and Public Buildings Act, 1874 [37 & 38 Vict. c. 84], they can be sued in contract, that question has been decided by *Graham v. Public Works Commissioners*. (3) I am bound by that decision. Therefore the present action must proceed as to the claims founded on breach of contract."

It must also be noticed that in *Rowland & Kennedy v. Air Council* (4) Russell J. expressly referred to the fact that the Air Council was not a corporation sole as one of the grounds of his decision.

That being the position, I should follow the decisions of Phillimore and Shearman JJ., if I thought they applied, without expressing any view of my own, leaving the matter to be determined if necessary by the Court of Appeal. But in my judgment those decisions do not apply, because the purpose for which the Minister of Health is made a corporation sole is expressly stated in s. 7, sub-s. 3—namely, "for the

(1) [1901] 2 K. B. 781, 791.

(2) [1915] 1 K. B. 45, 52.

(3) [1901] 2 K. B. 781.

(4) [1923] W. N. 64; 39 Times

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purpose of acquiring and holding land." That is the only purpose for which he is created a corporation sole. If it had been intended to create him a corporation sole for all purposes, with the usual results, there would be no object in sub-s. 4.

That being so, I do not think that the fact that the Minister of Health is constituted a corporation sole for the one purpose of holding and acquiring land is sufficient to take this case out of the well established rule, and the provision that the Minister may sue and be sued by the name of the Minister of Health is wholly insufficient to do so.

In these circumstances, ought I to permit this action to proceed further? I agree with the plaintiffs' contention that where there are serious questions of law and matters of serious importance to a large number of persons, it is, generally speaking, very undesirable that the matter should not be dealt with fully, and an application of this kind if successful may very often result in the matter not being gone into and dealt with as fully as it would be at the hearing. But the only question before me—namely, whether the Minister can be sued at all—has been very fully argued. There can be no other facts which can influence my decision. It is a question of construction of the Act itself, and the relevant authorities have been brought to my attention. I have considered the Act carefully, and having once come to the conclusion that it is not open to a subject to sue the Minister of Health in contract at all, but that any action he desires to bring must be by petition of right, it would be wrong for me to permit this action to proceed. It would merely be putting both the plaintiffs and the defendant to unnecessary and useless expense, because if I am right the plaintiffs cannot possibly succeed, whatever their merits, or whatever the defence. If the Minister cannot be sued at all in contract, this action cannot lie.

The statement of claim must be struck out, and the action dismissed with costs. Leave to appeal.

Solicitors : *Solicitor to Ministry of Health ; Cyril H. Kirby.*

G. R. A.

In re HYDE.MAUGHAM
J.SMITH *v.* JACK.1931
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—

[1931. H. 4163.]

*Will—Construction—Trust for Son's "Children or Reputed Children"—
Illegitimate Children born after Date of Will—Public Policy—Validity.*

A testator directed that the income of his residuary estate should be paid to his son for life, and after his death be held in trust for the son's "children or reputed children," as the son should by will or codicil appoint. The son had two legitimate children, one predeceasing him and the other being expressly excluded by the testator's will from benefiting under the power of appointment, and three illegitimate children, to the second and third of whom, under the power, he appointed the income of the testator's residuary estate in equal shares by his will, in which he described them by name and as his "children or reputed children." For many years payments of the income were made for the benefit of the children.

On a summons to determine (*inter alia*) whether the trusts in favour of "children or reputed children" were void as contrary to public policy as regards reputed children of the son (*a*) living at or (*b*) born after the date of the will:—

Held, that the power of appointment was valid, and that the son's appointment of the income to his "children or reputed children" named in his will was a proper exercise of the power.

In re Loveland [1906] 1 Ch. 542 and *Occleston v. Fullalove* (1874) L. R. 9 Ch. 147 considered.

ORIGINATING SUMMONS.

By his will dated April 19, 1898, John Hyde (hereinafter called "the testator") directed his trustees to pay the income of his residuary estate, subject to an annuity to his son Fred Hyde for life and after his death "in trust for the children or reputed children of the said Fred Hyde (other than Emily Hyde) . . . in such shares . . . upon such conditions and in such manner as the said Fred Hyde shall from time to time by will or codicil appoint," and in default of and subject to appointment as in the will mentioned. The testator died on September 13, 1898.

Fred Hyde was twice married, having one child by each marriage, the first predeceasing him, and the second being the said Emily Hyde (at the date of this summons

MAUGHAM Emily Spencer). He also was the father of children of two women to whom he was never married—namely, Mona Jack, the daughter of Emma Sunderland, born on July 2, 1892, and Freda and Florence Steggles (or Hyde), born respectively on May 9, 1914, and April 25, 1918. By his will dated August 12, 1925, he purported to appoint that the trustees of the testator's will should, after his death, stand possessed of the testator's residuary estate in trust for Freda and Florence Steggles (in the will called Hyde) in equal shares, and devised and bequeathed his real and personal estate to Freda and Florence Hyde in equal shares. Fred Hyde died on October 19, 1925. His will was never proved, but from 1918 (when the trustees of the testator's will, who took out this summons, were appointed) to 1929, portions of the income were paid by the solicitors acting for the trustees to the solicitor acting for the mother of Freda and Florence Steggles. By this summons issued on August 25, 1931, the trustees of the testator's will asked (inter alia) whether the trusts of the residuary estate of the testator after the death of Fred Hyde contained in the will in favour of "the children or reputed children of the said Fred Hyde (other than Emily Hyde)" were void as being contrary to public policy as regards: (a) reputed children of Fred Hyde living at the date of the testator's will; (b) reputed children of Fred Hyde born after that date.

J. M. Easton for the summons.

Preston K.C. and *H. C. Easton* for Mona Jack. A gift to future illegitimate children is bad as contrary to public policy: *Hill v. Crook* (1); *Occleston v. Fullalove* (2); *In re Goodwin's Trust*. (3) On the true construction of the will, the objects of the power are the legitimate or reputed children of Fred, who have attained during the testator's lifetime the reputation of being his children: *Metham v. Duke of Devonshire*. (4)

P. I. Bell for Freda and Florence Steggles. In the case of a gift to future illegitimate children the law does not prevent

(1) (1873) L. R. 6 H. L. 265.

(2) L. R. 9 Ch. 147.

(3) (1874) L. R. 17 Eq. 345.

(4) (1718) 1 P. Wms. 529.

inquiries to discover who is intended to benefit: *In re MAUGHAM Loveland* (1); nor, where there is a gift to illegitimate children by a specified woman does it prevent similar inquiries: *Occleston v. Fullalove*. (2)

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MAUGHAM J. [having stated the facts :] Having regard to the terms of the wills of the testator and of Fred Hyde, no legitimate child has any claim. There is no gift to illegitimate children *eo nomine*. The power is a power to appoint in favour of the “children or reputed children” of Fred Hyde.

As to the exercise of the power if it be valid there is no question, as it was exercised in favour of Freda and Florence, described as “children or reputed children of Fred Hyde.” I should here observe that the decisions in a number of the reported cases dealing with illegitimate children are to be explained by the fact that the Court declines to inquire into the actual parentage of a man’s alleged offspring. The most that can be done in the case of a gift to the illegitimate children of a male in a will describing the children in that way is (in a proper case) to construe it as a gift to children who have acquired, before the date when the will becomes effective, the reputation of being the children of the supposed father. There is no objection to the Court’s inquiry, not into the parentage, but into the reputation of persons described as “the reputed children of” a particular male. There may be a difficulty in regard to public policy, which I must consider later, but there is no difficulty in ascertaining who are the reputed illegitimate children of a particular person, and there is never any difficulty in inquiring who are the illegitimate children of an unmarried female: *In re Hastie’s Trusts* (3); *In re Loveland*. (1) In the case of a gift to the reputed children of a man by a particular woman there is, again, no difficulty in ascertaining who are those reputed children. *Occleston v. Fullalove* (2) was a case of a gift by a testator who had gone through a form of marriage with his deceased wife’s sister, by whom he had two daughters, a third being born after the date of the

(1) [1906] 1 Ch. 542.

(2) L. R. 9 Ch. 147.

(3) (1887) 35 Ch. D. 728.

MAUGHAM will. The form of the gift was for two named reputed children
J. and all other children whom he might have or be reputed to
1931 have by that lady, then born or thereafter to be born, and
HYDE, it was held that there was no objection to the validity of
In re. such a gift.
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v. In the present case, as a matter of construction it is not
JACK. in dispute that the testator intended by his will to give to
Fred Hyde a power of appointment by will or codicil by
which he could benefit all of his reputed children who came
into existence before his (Fred's) will became operative.
That power cannot be confined to the reputed children of
Fred in existence at the date of John's death; the reputed
children of Fred at any time can be ascertained.

The only question remaining is whether it is contrary to
public policy that a testator should by his will create a power
enabling a third person to provide by will or codicil for the
future reputed children of the third person.

It is true to say that objections to gifts of this kind on the
ground of their being contrary to public policy are not quite
so strong now as they were a century ago. Modern legislation,
e.g., the Legitimacy Act, 1926, which provides for the
legitimation of those born out of wedlock by the subsequent
marriage of their parents, goes to show that the view of the
Legislature is that no useful purpose is served by penalizing
illegitimate children, and that the true interests of public
policy do not require innocent persons to be punished in
that manner. But I must agree that it is settled by authority
that, in general, future illegitimate children cannot be provided
for by deed, such gifts being *contra bonos mores*, as tending
to encourage immorality; and the same observation is true
as to bequests to the illegitimate children of a third person
to be begotten after the death of the testator: *Occleston v.*
Fullalove. (1)

In the present case I have to decide whether the creation
of this power by the testator in favour of Fred Hyde means
that the testator was intending to encourage immoral
connection and to discourage marriage, and whether I ought

(1) L. R. 9 Ch. 147, 171.

therefore to treat the power as bad from its inception. I am very unwilling to enlarge the ambit of the rule as to public policy. The testator could clearly have given a far wider power exercisable in favour of future illegitimate children—namely, a general power to appoint by will. I am not prepared to say that the power under the will of the testator purported to encourage immorality. Reading the power and the will exercising it together, there is a gift to named existing persons in equal shares. I hold, accordingly, that the power was validly created and properly exercised.

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Solicitors: *Stow, Preston & Lyttelton, for Waddington & Son, Burnley; Bentleys, for Henry G. W. Cooper, Burnley.*

K. R. A. H.

In re MAY.

EGGAR v. MAY.

[1931. M. 82.]

C. A.
1931
LUXMOORE
J.
June 12,
16, 18.
C. A.
Oct. 15, 16.
—

Will—Legacy—Forfeiture if Legatee becomes a Roman Catholic—Attainment of Majority—Continuing to be Roman Catholic—Effect on Gift.

A testatrix who died in 1915 by her will bequeathed 5000*l.* upon trusts to invest and to accumulate the income until her nephew M. should attain the age of twenty-four years, and after he should have attained that age to pay the income of the 5000*l.* and of the accumulations to him during his life, “provided he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death until he shall after my death become a Roman Catholic” with a gift over on the happening of any of the aforesaid events or of his death, whichever should first happen. M. was born in 1906, and had at all times during his life been of the Roman Catholic faith. He had been baptized by a priest as a Roman Catholic, and confirmed by a Roman Catholic bishop, and was educated at a Roman Catholic public school.

In 1917, Neville J. held (*In re May* [1917] 2 Ch. 126) that M., who was then an infant, was not a Roman Catholic at the death of the testatrix within the meaning of the will, and he expressed an opinion that the testatrix meant him to have an opportunity of making his choice in the matter, which opportunity he would get after attaining the age of twenty-one years and before the legacy became payable.

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—

M. having now attained the age of twenty-four years the present summons was taken out by the trustees :—

Held, by Luxmoore J., that the words “until he shall after my death become a Roman Catholic” must, upon their true construction, include the event of M. being a Roman Catholic on the attainment of the age of twenty-four years after the testatrix’s death, and that M. having attained that age and being a Roman Catholic at that date, forfeited his life interest in the legacy.

On appeal :—

Held (affirming the decision of Luxmoore J.), that as Neville J. had decided that M. was not a Roman Catholic for the purposes of the will while a minor, and since attaining the age of twenty-one he had definitely adhered to the Roman Catholic Church, and on attaining the age of twenty-four years was still a member of that Church, he had forfeited his interest in the legacy by becoming a Roman Catholic after the testatrix’s death.

ORIGINATING SUMMONS.

The plaintiffs were the executors and the general trustees of the will, dated February 7, 1914, of Alice Mary May, spinster, who died in July, 1915.

By clause 7 of her will the testatrix bequeathed the sum of 5000*l.* free of all duties to her general trustees upon trust to invest as therein mentioned, and “upon further trust that my general trustees shall until my nephew the said Michael May shall attain the age of twenty-four years or the trusts in his favour hereinafter in this clause contained shall become incapable of taking effect accumulate the income of the said sum of 5000*l.* and the investments from time to time representing the same at compound interest and the resulting income thereof in any of the investments hereinbefore mentioned in augmentation and so as to follow the destination of the fund from which the same shall have proceeded and shall pay the income of the said sum of 5000*l.* and of any accumulations made as hereinbefore directed and the investments for the time being representing the same respectively (hereinafter together called ‘Michael’s settled legacy’) after the said Michael May shall have attained the age of twenty-four years to the said Michael May during his life provided that he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months

after my death until he shall after my death become a Roman Catholic or until he does or attempts to do or suffers any act or thing or until any event happens whereby if the same income were payable to him absolutely for his life he would be deprived of his right to receive the same or any part thereof in any of which cases as well as on the death of the said Michael May whichever first happens the trusts hereinbefore declared for payment to him of the income of Michael's settled legacy shall determine." Then followed (clause 8 of the will) a gift over of Michael's settled legacy, on the determination of the trusts thereof thereinbefore declared, to the Chancellor and Vice-Chancellor of the University of Oxford upon certain trusts.

By clause 9 of her will the testatrix bequeathed a further sum of 5000*l.* to her general trustees in trust for her nephew Gilbert May on identically the same terms and conditions as those declared concerning Michael's settled legacy, with a like gift over to the Chancellor and Vice-Chancellor of the University of Oxford upon certain trusts.

Michael May was born on June 16, 1906, and attained the age of twenty-one years on June 16, 1927.

The legacy now in question had been the subject of a summons taken out in 1917 (*In re May* (1)), when Neville J. held that Michael May, who was then an infant, had not forfeited the legacy, and he expressed the opinion that he was not a Roman Catholic at the testatrix's death within the meaning of the will and that the opportunity of making a final choice would be afforded him after attaining the age of twenty-one and before the legacy became payable.

Michael May having now attained the age of twenty-four years the question arose whether the legacy in question and the accumulations of income thereof were in the circumstances payable to the Oxford trustees to be held by them upon the trusts declared by clause 8 of the will, or whether they should be paid to Michael May, and the general trustees of the will issued the present summons for the determination (*inter alia*) of this question.

(1) [1917] 2 Ch. 126.

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The evidence showed that Michael May had all his life been a Roman Catholic, and that his father, who was a Roman Catholic, had caused him to be brought up in that faith. Michael May in his affidavit stated that to the best of his belief he had been baptized by a Roman Catholic priest; also that he had been confirmed by the Roman Catholic Bishop of Southwark, and that he had been educated at a Roman Catholic preparatory school and later on at the Roman Catholic public school, Downside. He further stated: "I am and have been all my life a Roman Catholic." He, however, claimed that upon the true construction of the will and in the events which had happened, the income of the legacy, including the income of the accumulations, was now payable to him.

W. P. Spens K.C. and *F. R. Evershed* for the plaintiffs.

H. B. Vaisey K.C. and *J. S. Franey* for the defendant Michael May. It is submitted that primarily a condition like this which might, perhaps, induce a parent to alter the religion of his children, will be closely scrutinized by the Court, and even more so if it might induce a child itself to alter its religion. This kind of inducement would be against public policy.

As regards this gift, the will has on a previous occasion been considered by the Court: *In re May* (1); and was referred to and applied in *Patton v. Toronto General Trusts Corporation*. (2) The proviso in clause 7 of the will does not apply. It is an impossible condition.

[LUXMOORE J. It seems clear that the testatrix did not intend the defendant to get anything if he was a Roman Catholic.]

Yes, in the words of the will. But, supposing the defendant adopted another religion during his infancy, the being a Roman Catholic at a particular moment would not necessarily prevent him receiving the legacy.

[LUXMOORE J. The actual question whether or not he was a Roman Catholic was not really decided or argued before

(1) [1917] 2 Ch. 126.

(2) [1930] A. C. 629.

Neville J. in *In re May*. (1) The question to be considered is whether he is now a Roman Catholic.]

It is submitted that what has to be considered is whether this condition in any of its sub-divisions has been so complied with as to cause a forfeiture of the legacy.

Both the defendant and his father expressly repudiate the notion that the defendant became a Roman Catholic after twenty-one. They say he always was a Roman Catholic. But Neville J. held that he was not.

[LUXMOORE J. I think all he said was: "The Court will give this child a locus poenitentiae."]

[The argument in *In re May* (2) was read and discussed.]

The difficulty that has now arisen is due to the decision of Neville J. in that case.

[LUXMOORE J. Neville J. gave the infant, as he then was, a choice as to his religion. He has exercised his choice and said he is a Roman Catholic.]

There is also the question of public policy, and for this the will itself must be very closely scrutinized. The proviso is one of a very curious kind, the effect being that it relates to the state of affairs on the day the testatrix dies or twelve months afterwards. Take the phrase, "until he shall after my death become a Roman Catholic"; that word "until" presupposes it has been done. It should be read "after he shall attain twenty-four," and so on. "Until" means "to the time." It is a terminus ad quem. The life estate stops on his twenty-fourth birthday. That is the terminus a quo, and the terminus ad quem cannot be behind the terminus a quo. It is a defeasance clause.

This proviso is really putting upon the defendant or his father an obligation to disclaim his religion.

In the case of an infant it would be against public policy. It is a condition that the legatee shall cease to be a Roman Catholic. That is the vice of this proviso. On the question of public policy, see *Wilkinson v. Wilkinson* (3); *In re Agar-Ellis* (4); *Hodgson v. Holford* (5); *In re Sandbrook* (6);

(1) [1917] 2 Ch. 126.

(4) (1878) 10 Ch. D. 49, 56, 71, 73, 74.

(2) [1917] 2 Ch. 126, 130.

(5) (1879) 11 Ch. D. 959, 966.

(3) (1871) L. R. 12 Eq. 604, 608.

(6) [1912] 2 Ch. 471, 476.

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In re Boulter (1); *In re Wilkinson*. (2) It is against public policy to induce a child by a bribe of a large sum of money to change its religious belief.

See also *Iredell v. Iredell* (3); *Partridge v. Partridge*. (4) If, as is submitted, the proviso in the will was against public policy, the defendant in this case never after the testatrix's death became a Roman Catholic, he was one all the time.

The testatrix therefore had not used appropriate words sufficient to deprive the legatee of the gift.

As to retrospective obligations, see the cases of *West v. Williams* (5); *In re Chapman*. (6)

C. Montgomery White for the Oxford trustees. The defendant Michael May is a Roman Catholic, and therefore the clause in the testatrix's will must operate. The Court will not, it is submitted, interfere with the religious education of a minor in cases of a pecuniary benefit which he may derive, as in a case like the present: *Talbot v. Earl of Shrewsbury*. (7) There is nothing which can be considered as contrary to public policy in a proviso like this. It is the father's duty to consider the spiritual and temporal welfare of his son: *In re Borwick's Settlement* (8); *In re Boulter* (9); and compare *Clavering v. Ellison*. (10)

As to words of futurity such as in the will, "until he shall," see Jarman on Wills, 7th ed., vol. ii., p. 1488; *In re Chapman* (6); *In re Hewitt*. (11)

LUXMOORE J. The question which has been raised by this summons is whether the legacy and the accumulations of income which have been made are now payable to the Oxford trustees to be held by them upon trusts declared by clause 8 of the will or how otherwise the fund ought to be dealt with. One of the defendants to the summons is Michael William Blount May, the person who is described

(1) [1922] 1 Ch. 75, 83.

(2) [1926] Ch. 842.

(3) (1885) 1 Times L. R. 260.

(4) [1894] 1 Ch. 351.

(5) [1899] 1 Ch. 132, 148.

(6) [1904] 1 Ch. 431.

(7) (1840) 4 Myl. & Cr. 672, 686.

(8) [1916] 2 Ch. 304.

(9) [1922] 1 Ch. 75.

(10) (1859) 7 H. L. C. 707.

(11) [1926] Ch. 740.

in clause 7 of the will as "my nephew Michael May." He claims that upon the true construction of the will, and in the events which have happened, the income of the legacy, including the income of the accumulations, is payable to him.

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The material facts are I think shortly these. Michael William Blount May was born on June 16, 1906. His father then professed, as he still professes, the Roman Catholic faith, and in due course his son was baptized by a Roman Catholic priest in accordance with the rites of that Church. Later on he was confirmed by the Roman Catholic Bishop of Southwark, and was sent to a Roman Catholic preparatory school at Seaford, and proceeded from there to the well-known Roman Catholic School at Downside. He attained the age of twenty-one years on June 16, 1927. His adherence to the Church of Rome has never wavered. He states in paragraph 3 of his affidavit: "I am and have been all my life a Roman Catholic." At first sight, at any rate, it would appear difficult to understand how, in these circumstances, he could claim the benefit of the legacy under the will.

The point, however, arises in this way. At the date of the testatrix's death, which took place on July 3, 1915, the defendant Michael May was only nine years of age, and the question arose whether, having regard to his age, it could be said that he was a Roman Catholic, or if he was whether he could cease to be within twelve months of the testatrix's death, and so comply with the condition in the will. The matter came before Neville J. in the year 1917, and the case is reported in the Law Reports. (1) The case came before the learned judge on an originating summons which was taken out to determine the question whether the legacy fund became, at the end of twelve months from the testatrix's death, payable and transferable to the Chancellor and Vice-Chancellor of the University of Oxford. Neville J. held that the fund was not payable or transferable at that time, and in his judgment he said this: ". . . but obviously the testatrix does not intend him"—that is, the infant—"to

(1) [1917] 2 Ch. 126, 129, 130.

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enjoy it at all if he is a member of the Roman Catholic Church, and she has repeatedly indicated her intention to that effect." Then he refers to the clause in the will, and I think his decision is really summed up where he says : "The result to my mind is that during the time until he"—that is, the nephew—"reaches the age of twenty-one he cannot in the sense meant in the will be said to be either a Roman Catholic or not a Roman Catholic. In the eyes of this Court he cannot determine what his religion shall be until he has reached years of discretion. It is quite true that, if you asked a priest of the Roman Catholic Church, he would unhesitatingly tell you the child was a Roman Catholic, but I do not think the Court has anything to do with that. The view of the Court is not the view of the priest. Having come to the conclusion that the testatrix meant that there was to be a choice on the part of the legatee, I think the legatee must have an opportunity of exercising that choice. That opportunity will be his if, after attaining twenty-one and as he approaches twenty-four, he can consider whether he will be a Roman Catholic or not. All that I decide now is that by being baptized in the Roman Catholic Church he has not forfeited his legacy," and therefore he held the fund not to be payable at that time. With all respect to the learned judge, I doubt whether he is really correct in saying that in the eyes of the Court a person cannot determine what his religion shall be until he has reached the age of twenty-one. For my own part, I should have thought that a person under the age of twenty-one could properly determine his adherence to a particular religion before attaining that age. Take, for instance, the case of a member of the Church of England, a person who has been baptized and confirmed and who is a communicant; he or she is recognized as a member of the Church of England, and is, at any rate after attaining eighteen years of age, eligible to be entered on the electoral roll of the particular Church which he or she usually attends. I do not think that the learned judge really decided that point. All he decided was that, in that particular will, the legatee was intended to have an opportunity of exercising

his choice whether he would or would not adhere to the Roman Catholic religion and that this opportunity would be afforded to him during the period which would elapse between his attaining the age of twenty-one years and the attainment of the age of twenty-four. I think that view of the decision is approved by the Privy Council in the case to which I was referred, of *Patton v. Toronto General Trusts Corporation*. (1) In my view all Neville J. decided beyond that was that the fact that he was baptized in the Roman Catholic Church did not make him a Roman Catholic, and with that part of his decision I find myself in complete agreement.

Mr. Michael May has now reached the age of twenty-four years, and Mr. Vaisey on his behalf claims that the income of the legacy, as from the date of his attainment of that age, is payable to him and will remain so payable to him during the residue of his life provided no further change is made in his religion. As I understand his argument, it is that Mr. Michael May was in fact a Roman Catholic at the testatrix's death and that he has always remained one; that the proviso in the will is invalid, and that, upon a strict construction, the gift over has not taken effect. He says that the proviso is void as being against public policy because it tends to deter the father of the legatee from performing an important part of his parental duties, that is, the bringing up of his child in the religion professed by himself, and also because it may be calculated to interfere with the discretion of the Court as to the religious bringing up of a potential ward. For this argument he relies on the judgment of Parker J. in *In re Sandbrook*. (2) In that case the testatrix directed her trustees to stand possessed of a share of her residuary estate upon trust to pay the income thereof to her two grandchildren up to and including December 31, 1927, in equal shares, and there was a provision that after that date they should divide the same between those two grandchildren. Then there is this provision: "That if at any time on or before December 31, 1927, either

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one or both of my grandchildren shall live with or be or continue under the custody, guardianship or control of their father . . . or be in any way directly under his control, all benefits, profits and income provided to be given under this my will to both or either one of them, as the case may be, shall thereby cease and determine, and it shall be at all times and under all circumstances an absolute condition of either one or both of them receiving any income, benefit or legacy under this my will that he or she or both of them shall separately and individually continue to live free from his direct influence and control.” In the course of his judgment Parker J. said this : “ The first point that arises on the construction of that clause ”—the forfeiture clause—“ is this : Is it a condition in defeasance of what has been already given, or can I construe the will as creating a limitation in favour of these children until the arrival of the date mentioned or until the happening of some earlier event ? ” Then he says that in his opinion on the true construction the condition is a condition defeating the interest already given, and not a limitation until a certain event, and he goes on to say : “ Then, if it is a condition in defeasance of what has already been given, the question arises as to whether it is a valid condition to which I can give effect. . . . It appears to me that this condition is inserted in the will with the direct object of deterring the father of these two children from performing his parental duties with regard to them, because it makes their worldly welfare dependent on his abstaining from doing what it is certainly his duty to do, namely, to bring his influence to bear and not give up his right to the custody, the control and education of his children ; and it seems to me it is also a direct consequence of a condition of this sort that the discretion of the Court with regard to the custody and maintenance of its wards is equally interfered with. If, for example, I myself—these children being now wards—thought it was for their benefit to direct that they should spend the next year or so with their father (who is a medical officer on furlough from the Malay States) at the seaside under his direct control, I should be fettered in exercising the discretion vested in me

by the knowledge that, if I exercised it in this way, I might endanger their worldly welfare and cause them to forfeit what has been given them under the will." In the present case, nothing is given by the will to the defendant Michael May until he attains the age of twenty-four years. I think the proviso would have the effect of defeating the gift by way of anticipation, and I think I am prepared to hold, following the decision of Parker J., that the proviso is void for the same reasons as were relied upon by him in *In re Sandbrook*. (1) But, of course, this does not dispose of the matter.

As I pointed out, the defendant Michael May takes nothing until he attains the age of twenty-four. The gift is to him after he shall attain twenty-four, and is to him for life until he shall, after the testatrix's death, become a Roman Catholic. I can have no doubt that on the true construction of the will, the testatrix intended to provide against Mr. Michael May receiving any benefit given to him by the will or any part of it if he was in fact a Roman Catholic at the time the benefit was receivable by him, and that the testatrix was not merely making a provision against the transition by Michael May to Roman Catholicism. Obviously the words used would ordinarily imply a transition, but they also obviously provide against a particular religious status, and there can be no doubt that at the moment when Michael May was otherwise entitled to receive this legacy he was in fact a Roman Catholic. I think that the words "until he shall after my death become a Roman Catholic" must, upon their true construction, include the being a Roman Catholic on the attainment of the age of twenty-four after the testatrix's death. As I say, it is admitted that he was a Roman Catholic at that date and that he still remains one, and consequently I hold that the legacy and the accumulations, in the events which have happened, are now payable to the Oxford trustees.

A. R. T.

Michael May appealed, and the appeal was heard on October 15, 16, 1931.

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H. B. Vaisey K.C. and *J. S. Franey* for the appellant repeated in substance the arguments used by them in the Court below, except that they did not now raise the point as to the condition being contrary to public policy.

Fergus Morton K.C. and *C. Montgomery White* for the Oxford trustees were not called upon to argue.

W. P. Spens K.C. and *F. R. Evershed* for the trustees of the will.

LORD HANWORTH M.R. stated the facts and continued: The question we have to determine is whether or not Michael May has, upon the terms of the will, a right to take the life interest which is secured to him by the will of this sum of 5000*l.* which was handed over to the trustees for investment and also for accumulation of income from the investments, so that the investments and the income followed the destination of the fund. Then the will goes on to provide for the payment of the income of the 5000*l.* and the accumulations "after the said Michael May shall have attained the age of twenty-four years to the said Michael May during his life provided that he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death until he shall after my death become a Roman Catholic." It appears that Michael May is not merely a Roman Catholic, but he has been a Roman Catholic, as I understand it, from birth; at any rate on November 14, 1915, he was confirmed, the rite of confirmation of the Roman Catholic Church was exercised upon him, a rite which is a very definite one. He has been throughout his life a loyal and zealous member of the Roman Catholic Church. Before I come to construe the actual words of the will, I must refer to this. In the year 1917 there was a summons taken out to determine whether or not the infant legatee, as he then was, had forfeited the possibility of his enjoying this life interest by reason of the fact that he was a Roman Catholic, and what Neville J. in his judgment said was (1): "The result to my mind is that during the time

(1) [1917] 2 Ch. 126, 130.

until he reaches the age of twenty-one he cannot in the sense meant in the will be said to be either a Roman Catholic or not a Roman Catholic. In the eyes of this Court he cannot determine what his religion shall be until he has reached years of discretion." Let us remember that these words were spoken in June of 1917 at a time when Michael May was just eleven years old and no more. Then Neville J. continued : " It is quite true that, if you asked a priest of the Roman Catholic Church, he would unhesitatingly tell you the child was a Roman Catholic, but I do not think the Court has anything to do with that. The view of the Court is not the view of the priest. Having come to the conclusion that the testatrix meant that there was to be a choice on the part of the legatee, I think the legatee must have an opportunity of exercising that choice." Why does he say that the testatrix meant there was to be a choice on the part of the legatee? I think that is quite plain from the terms of the will, because the proviso is " provided that he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death," and then the third condition is " until he shall after my death become a Roman Catholic." Without dealing more closely with it, it would look as if there were three opportunities given of testing whether he is an adherent of that Church, first the death, secondly, the expiration of twelve months after the death and then another time " until he shall after my death become a Roman Catholic." Therefore, it seems to me that Neville J., in construing this will, was right in saying that the testatrix meant that there was to be a choice on the part of the legatee. It does not mean that any doubt is thrown upon the original and constant loyalty of the young man to the Church throughout his life. What it does mean is that the Court, which in its jurisdiction is favourable to infants, is reluctant to impute to the infant that what has been done for him and with his concurrence is to deprive him of the material advantage which he can or might reap under the will. Indeed, *Patton v. Toronto General Trusts Corporation* (1) approves of that course, because there

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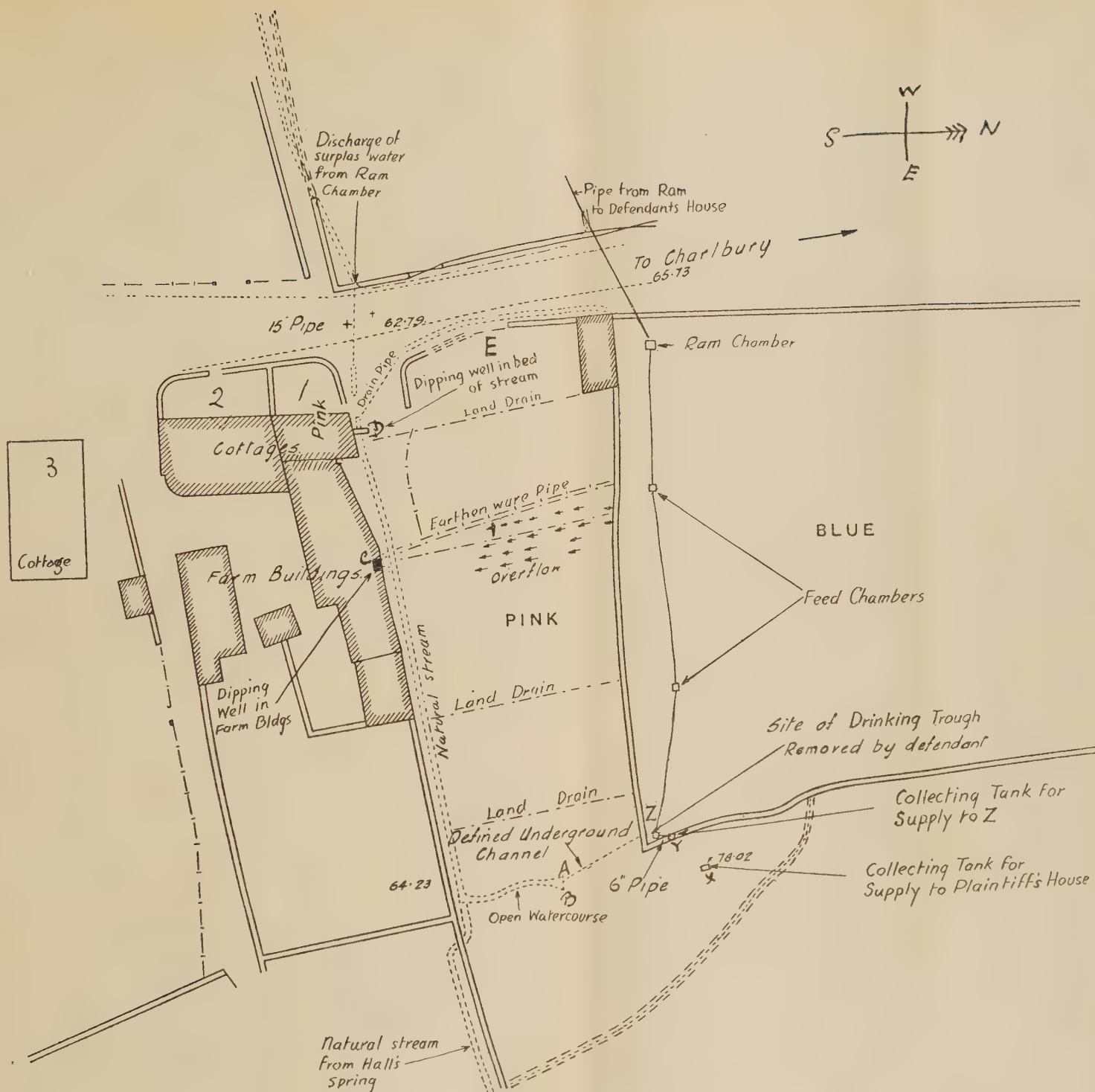
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the judgment of the Court (1) is that: "the testator meant that the appellant was to have a real choice in the matter, and just as, in the eye of the Court, the appellant was not in a position truly to determine what his religion was until he had attained his majority (*In re May* (2)), so the testator here has not imposed upon him any earlier limit of time." In other words, the Court will safeguard the interests of the infant until such time as he has reached an age when upon him must rest the responsibility of choice and definite adherence one way or the other. Neville J. concludes his judgment in this way (3): "All that I decide now is that by being baptized in the Roman Catholic Church he has not forfeited his legacy. The accumulations therefore will continue, and the question asked by the summons will be answered in the negative." The upshot of that decision is this: no definite conclusion as to whether the legacy had lapsed was come to at that time. The accumulations were to continue and an opportunity was to be given to the young man, at such an age as the responsibility falls upon him and not upon others, of determining whether or not his adherence was definite and sure to the Roman Catholic Church. The evidence is quite plain that Michael May would be sorry to have it put in doubt that he was a member of the Roman Catholic Church. He has now reached the age, not only of twenty-one, but of twenty-four. We now have to see, with that responsibility for his choice resting upon him, whether or not he has fulfilled the condition precedent laid down by the will "provided that he shall not be a Roman Catholic at my death"—under the decision of Neville J. he was not, in the legal sense, a Roman Catholic at the time of her death within the meaning of this will—"or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death." That clause does not come into operation, because within the meaning of the will he was not deemed to be a Roman Catholic at her death. Then the will goes on:

(1) [1930] A. C. 636.

(2) [1917] 2 Ch. 126.

(3) [1917] 2 Ch. 130.



"until he shall after my death become a Roman Catholic." After the death, what is he? After the death, and at a time when responsibility attaches to him, it is plain that he is a Roman Catholic. It is said that he did not become a Roman Catholic, but in accordance with the terms of the will and in accordance with the decision of Neville J. he has become a Roman Catholic, because he became that when the responsibility for his adherence to the Church fell upon his shoulders and he became, in that sense, a Roman Catholic "after my death or until he shall become a Roman Catholic." It is said that the duty fell upon the trustees of paying the income for his life and that that started at once as soon as he was twenty-four, but at the same time the negation of that duty also fell upon them, because within the meaning of the will he had become a Roman Catholic at a point of time which is subsequent to the death of the testatrix. Therefore the answer must be made that he had, after the death, become a Roman Catholic, and that connoted the determination of the life interest.

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For these reasons, giving the benefit of the decision of Neville J. to the young man, the terms of this will make it plain, by reason of these words "until he shall after my death become a Roman Catholic," that these conditions precedent cannot be fulfilled. The result, therefore, is that the life interest given to him fails and the gift over, as provided in the next clause, must take effect.

LAWRENCE L.J. I agree and have nothing to add.

ROMER L.J. I agree, and I only desire to add this. As has been pointed out by the Master of the Rolls, this young man, in popular language, has been a Roman Catholic from the date of his birth, and yet fourteen years ago Neville J., in proceedings in which it must be taken there were the same parties as are now before us, decided, as I read his judgment (1), that for the purpose of this will the legatee must not be deemed to have been a Roman Catholic at the date of the testatrix's

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death. That being so, it is impossible, it seems to me, for either of the parties before us to quarrel with that decision ; there has been no appeal from it then or at any time afterwards. For myself, I refrain from expressing any opinion whether that decision can or cannot be supported.

Solicitors : *Slaughter & May ; Somerville, Philpot & Co., for Morrell, Peel & Gamlen, Oxford ; Thomas Eggar & Son.*

W. I. C.

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Water—Artificial Watercourse—Tank on Land for supplying Cattle with Water—Overflow on to other Land of Common Owner—Subsequent separate Ownership of Land—Works by Owner of Tank resulting in Reduction of Overflow—No Prescriptive Right to Overflow—No Right to Overflow passing under General Words implied in Conveyance—Water discharged on to Surface of Neighbouring Land as result of tapping Springs in digging a Trench—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 62.

The plaintiff was the owner of a cottage and farm land (the pink land) under two conveyances made to his predecessors in title in 1919, and the defendant was the owner of adjoining land (the blue land) conveyed to her in 1929 by the same common owners. More than forty years ago the common owners constructed a collecting tank for water, mainly on the pink land, which fed a tank (Tank Z) on the edge of the blue land. Tank Z was used as a drinking trough for cattle and horses, and it had no outlet, but was tipped towards the south so that it overflowed on to the pink land through a wall between the pink and the blue land. The overflow was then conducted by a stone drain to an open watercourse along which the water flowed to the southern boundary of the pink land. The watercourse then turned and flowed along inside the southern boundary, being joined at the bend by a natural stream. At least from the bend the watercourse was a natural stream, and at two points along it were dipping points, one used for watering the plaintiff's cattle and the other used by cottagers and other persons, including the occupants of the cottage on the pink land and of two other cottages near by which also belonged to the plaintiff. In February, 1920, the defendant substituted for Tank Z a covered brick tank connected by an underground pipe laid along the southern boundary of the blue land to a ram which pumped water to the defendant's house. There was also

* Sitting as an additional judge of the Chancery Division.

an overflow outlet to the new tank by which the overflow still passed through the boundary wall on to the pink land, but the flow was substantially diminished. In laying the pipe along the southern boundary of the blue land in a trench, springs were tapped and damage was said to have resulted from the escape of this water on to the surface of the pink land :—

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Held, (1.) that as Tank Z had been constructed simply for supplying water to cattle and horses grazing on the blue land and not for the benefit of the pink land, there could be no expectation that the overflow from it would be other than temporary, and the right to the continuance of the overflow did not pass under the general words implied in the conveyances of the pink land in 1919 by the Conveyancing Act, 1881, s. 6 (now the Law of Property Act, 1925, s. 62): *Watts v. Kelson* (1871) L. R. 6 Ch. 166 applied. (2.) That the plaintiff had no prescriptive right to have the water naturally flowing in the stream along the southern boundary of the pink land augmented by the overflow from Tank Z along an artificial watercourse which had been constructed for a temporary purpose only: *Greatrex v. Hayward* (1853) 8 Ex. 291 and *Baily & Co. v. Clark, Son & Morland* [1902] 1 Ch. 649 applied. (3.) that the plaintiff was not entitled to relief in respect of water discharged on to the surface of his land as the result of tapping the springs, as the tapping was caused in the natural and proper user of the defendant's own land and did not cause any substantial damage to the plaintiff's land: *Hurdman v. North Eastern Ry. Co.* (1878) 3 C. P. D. 168 distinguished.

WITNESS ACTION.

The following statement of the facts is substantially taken from the judgment :—

The relevant facts of this case are not really in dispute. On the plan annexed to the statement of claim the plaintiff's land, situated at Charlbury, Oxfordshire, is coloured pink, and the defendant's neighbouring land is coloured blue. In the course of the trial certain letters and figures were placed on this plan for convenience of reference, and in this judgment I have referred to those letters and figures as if they had originally been on the plan. [The plan with these numbers and figures is here reproduced so far as material for the purpose of this report.] Prior to the year 1919 both the pink and the blue land were in the same ownership. More than forty years before the defendant executed the works complained of in this action the common owner of both the pink and the blue land had constructed a collecting tank (marked Y on the plan), situate mainly on

LAWRENCE the pink land, but projecting to a small extent into the blue
L.J. land. This tank is about 2 feet square and 16 inches deep ;
1931 its northern side consists of the natural rock and its other
BARTLETT sides are made of bricks. The water collected in this tank
v. was led by means of a 6-inch iron pipe to another tank
TOTTENHAM. (marked Z on the plan) situate wholly on the blue land.
Tank Z was made of iron and was let into the ground in the
angle of the wall at the extreme south-eastern corner of the
blue land ; it was oblong in shape, being 4 feet in length from
north to south, 18 inches in breadth from east to west and
16 inches deep. This tank had no outlet, but was slightly
tilted towards the south so that the water flowing into it
overflowed at its southern end into the wall forming the
northern boundary of the pink land. Tank Z served as a
drinking trough for cattle and horses grazing on the blue land,
and as there was a continuous flow of water into it from
tank Y so there was a continuous flow out of it on to the
pink land, diminished in quantity only by the amount of water
consumed by any cattle and horses for the time being on the
blue land. This overflow was never less than from 12 to
15 gallons per minute in dry weather, and in wet weather
amounted at times to as much as from 30 to 40 gallons per
minute. The wall forming the northern boundary of the
pink land was a dry-stone wall, and the water overflowing
from tank Z ran freely through it and was then conducted
by an artificially constructed subterranean stone drain to
the point marked A on the plan, where it discharged into
an open watercourse, which is also fed by an underground
spring on the pink land, the water from which is conducted
in a stone drain to the point B. The water in this open
watercourse flows to the southern boundary of the pink land,
where the watercourse turns at right angles in a westerly
direction and the stream then flows along that boundary. At
or about the point where this stream turns westwards it is
joined by another natural stream, the source of which is a
spring called Hall's Spring situate some little distance up
the valley. The defendant does not dispute that the open
stream which I have described is a natural stream from

the point where it turns westwards and flows along the southern boundary of the pink land.

There is another collecting tank (marked X on the plan) situate wholly on the pink land to the east of tank Y. Tank X, which is about 8 feet deep, serves the purpose of collecting water for use in the plaintiff's dwelling-house and garden on the other side of the valley, where it is pumped into a reservoir by a windmill. Owing to the existence of a fissure in the underlying rock, there is an underground connection between tanks X and Y, and some of the water collected in tank X finds its way into tank Y, and vice versa. I have mentioned the existence of tank X, because the plaintiff at the trial evidently attached some importance to the connection between it and tank Y; but in my opinion this connection has no bearing on the questions to be determined in this case.

There are two dipping places on the natural stream flowing along the southern boundary of the pink land. The first of these dipping places is at the point marked C on the plan where there are two holes, some little distance apart, in the wall of the plaintiff's farm buildings, which abut upon the southern bank of the stream. These holes are practically on a level with the bed of the stream and permit water from the stream to flow into and out of the plaintiff's farm buildings, passing on its way through a trough constructed on the inside of those buildings. The water passing through this trough is used by the plaintiff for watering his cattle on the farm. The second dipping place (marked D on the plan) is constructed in the bed of the stream further to the west and near to the Charlbury high road. The water from this dipping place is used by the cottagers living in the immediate vicinity (whose cottages are marked 1, 2 and 3 on the plan), and also by the neighbouring farmers and others who gain access to it from the high road.

The pink land lying to the north of the stream slopes sharply from north to south. The blue land is comparatively level, but has a slight slope from north and east to south and west. The geological structure of the area in which

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LAWRENCE the blue and pink land are situate is shown on the diagram-
L.J. matic section produced by Dr. Bayzand. The blue land and
1931 the extreme north-eastern portion of the pink land are on a
BARTLETT water-table, the southern edge of which is on a line drawn
v. from east to west slightly to the south of and parallel with the
TOTTENHAM. wall forming the northern boundary of the pink land. This
water-table consists of a substratum of upper lias clay, over
which there is a water-bearing stratum of inferior oolite,
and the result of this geological formation and of the slope
of the strata is that the water on this table percolates by
gravitation into and upon the pink land and renders it
naturally wet, necessitating thorough drainage if it is to be
made fit for cultivation. The evidence shows that the pink
land has always been boggy in places, and in other places has
been wet enough on the surface to have watercress beds upon
it. There are traces of a ditch having existed along the
southern side of the wall forming the northern boundary of
this land, and there still exist four subterranean stone drains
running north and south across it which were constructed
many years ago. In or about the year 1922 an earthenware
pipe drain also running north and south was laid across the
pink land opposite the dipping place C. In former times the
pink land was cultivated, but it is now overgrown with rank
vegetation and is in a thoroughly neglected condition. The
effect of Mr. Bayzand's evidence is that in order effectively
to drain the pink land one or more drain or drains running
east and west as well as drains running north and south would
be required, as the water from the blue land naturally perco-
lates into the pink land all along the edge of the water-table,
and drains running north and south would only catch part
of the water so percolating.

On March 25, 1919, the common owners of the pink and blue
land conveyed the cottage and garden situate on the pink
land (marked 1 on the plan) to Mrs. Cranfield, and on
August 25, 1919, they conveyed to her the remainder of the
pink land. On July 19, 1921, Mrs. Cranfield conveyed the
whole of the pink land to the plaintiff. On December 20,
1929, the former common owners conveyed the blue land to

the defendant. In the month of February, 1930, the LAWRENCE
 defendant executed the following works upon the blue land. L.J.
 She removed the iron tank Z, and on its site constructed a 1931
 new covered brick tank about $3\frac{1}{2}$ feet square and $2\frac{1}{4}$ feet BARTLETT
 deep. She connected the 6-inch pipe leading from tank Y v.
 to the new tank, which latter tank had two outlet holes, one TOTTENHAM.
 on the west side and the other on the south side. The outlet
 hole on the west side is 2 inches in diameter and is placed
 1 foot below the top of the tank, and the outlet hole on the
 south side is 4 inches in diameter, and is now placed 10 inches
 below the top of the tank. The latter hole acts as an over-
 flow outlet and discharges the surplus water from the tank
 into the wall forming the boundary of the pink land at the
 same spot where the overflow from the former iron tank Z
 used to be discharged. The outlet on the western side of
 the new tank is connected with a 2-inch pipe, which is laid
 underground along the southern boundary of the blue land
 and leads a substantial part of the water flowing into tank Z
 through several feed-chambers to a ram constructed in a
 chamber in the south-western corner of the blue land. The
 ram, when working, pumps part of the water flowing into
 the ram-chamber up to the defendant's house situate on the
 other side of the Charlbury high road.

The result of the works so executed by the defendant is
 in the first place substantially to diminish the volume of
 the water which had hitherto overflowed from the iron tank Z
 on to the pink land and, in the second place, to cause some
 water to escape at the south-western corner of the blue land
 on to the grass verge of the Charlbury high road. The
 plaintiff alleges that by reason of the diversion of part of the
 water which formerly flowed from tank Z on to the pink
 land, the water in the dipping places C and D has been
 seriously diminished, and that there is not now sufficient
 water at those places for his needs; and further, that the
 water escaping on to the verge of the high road percolates
 down that verge and renders the approach to his rickyard
 (the entrance of which is marked E on the plan), boggy and
 unusable for carts. The plaintiff further alleges that in

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digging the trench for the purpose of laying the 2-inch pipe the defendant's workmen tapped several springs, and that the water from the springs so tapped not only escapes on to the verge of the high road, as above described, but also escapes on to the pink land at the place marked with arrows on the plan, rendering that part of the pink land water-logged and foundrous. Originally the surplus water from the ram-chamber was discharged on to the verge of the high road, but this surplus water is now carried across the road and none of the water flowing through the 2-inch pipe to the ram-chamber is now discharged so as to interfere with the use by the plaintiff of the entrance to his rickyard.

The plaintiff is the owner of the other two cottages mentioned above and numbered 2 and 3, as to one under a conveyance to him dated September 27, 1920, and as to the other under an admission upon a surrender being made to him dated April 9, 1920.

Elliot Gorst for the plaintiff. The plaintiff is entitled to the continuance of the flow of water to the dipping places. The right to the flow must be taken to have passed to him under the general words implied in a conveyance by the Conveyancing Act, 1881, s. 6 (now the Law of Property Act, 1925, s. 62), as the result of the conveyances of March 25 and August 25, 1919, made to the plaintiff's predecessors in title by the common owners of the plaintiff and the defendant's land: *Wheeldon v. Burrows*. (1) It is true that the water is carried during its early stages along an artificial watercourse, but this does not affect the rights of the plaintiff: *Schwann v. Cotton*. (2) The plaintiff is also entitled to the right by prescription. The plaintiff also claims against the defendant in respect of water which flows on to his land as a result of some underground springs being cut on the defendant's land when a pipe was laid in connection with the new ram.

Harold Christie and *D. S. Chetwood* for the defendant. The first matter complained of by the plaintiff is the reduction of the flow of water out of tank Z on to his land through

(1) (1879) 12 Ch. D. 31.

(2) [1916] 2 Ch. 459.

the wall forming the northern boundary of his land. It is not suggested, however, that when the water gets to the plaintiff's land it is a natural stream, though the water afterwards flows into a natural stream fed from other sources. Rights in respect of artificial water can only be obtained as easements. A man cannot be compelled to continue discharging surplus water that he had not needed. The discharge has been for a temporary purpose only, and no right can arise in respect of it, either under an implied grant or under the general words implied in a conveyance. It is not a matter in respect of which an easement can arise, for the enjoyment of the surplus water is precarious, and a precarious easement is unknown to the law. Thus a mine-owner who in the course of working his mine has pumped water out of it which has flowed on to neighbouring property cannot be prevented from closing his mine : *Arkwright v. Gell*. (1) It is immaterial that the flow has continued for over twenty years, and no prescriptive right to the overflow can be established. The principle of that case has been followed in *Wood v. Waud* (2) ; *Greatrex v. Hayward* (3) ; and *Burrows v. Lang*. (4) It is not as if the defendant was interfering with any pipe on the plaintiff's land or polluting the water. The defendant does not question the plaintiff's right to do what he likes with water that comes on to his land. The difficulty of establishing a prescriptive right to an artificial flow of water is pointed out in *Chamber Colliery Co. v. Hopwood*. (5) *Schwann v. Cotton* (6) is distinguishable, for there the common owner had laid a pipe over one part of his property in order to allow water to pass through it for the benefit of the other. Here the water was collected for the use of cattle on the defendant's land, and it was merely by way of overflow that the surplus water passed on to the plaintiff's land. There is no suggestion that the artificial works had been constructed in order to provide the cottagers with water. It cannot be suggested that the defendant

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(1) (1839) 5 M. & W. 203.

(2) (1849) 3 Ex. 748.

(3) (1853) 8 Ex. 291.

(4) [1901] 2 Ch. 502.

(5) (1886) 32 Ch. D. 549, 558.

(6) [1916] 2 Ch. 459.

LAWRENCE must maintain a cattle trough in order that surplus water
L.J. from it may be used at the dipping places.

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The plaintiff's second complaint is that the defendant has caused water to percolate through the boundary fence on to the plaintiff's land and down the road. The defendant is not responsible if he accidentally diverts the direction of underground streams running in no defined course in his land. The principle of *Rylands v. Fletcher* (1) applies only to things artificially brought on to the defendant's land and kept there, and not to things which are naturally there: compare *Crompton v. Lea*. (2) No action will lie because a person in digging on his own land diverts the course of water flowing in the land: *Wilson v. Waddell*. (3) In *West Cumberland Iron and Steel Co. v. Kenyon* (4) the water let loose had been collected by the action of the defendants, but even so there was no liability to the neighbouring owners, because in getting rid of the water the defendant cast no extra burden on them. Here the defendant has made no artificial works, and done nothing to collect water. All she has done is to have a trench dug, a pipe laid in it, and the trench filled up. The position is almost exactly as in *Wilson v. Waddell*. (3)

Elliot Gorst in reply. The facts here justify the inference that at all time within living memory a stream has flowed down the hill side and overflowed from the defendant's land on to the plaintiff's land until the works were undertaken by the defendant of which complaint is made. At some time that water was for convenience collected into two tanks, the first being a collecting tank and the second for watering cattle, and the overflow continued to come on to the plaintiff's land, when it was made use of at the two dipping places. When the cottage on the pink land was purchased from the common owners that supply was in existence, and the purchaser would naturally expect to benefit by its continuance. That benefit passed under the general words implied by s. 6 of the Conveyancing Act, 1881. This is a stronger case than *Schwann v. Cotton* (5), for there the easement was not

(1) (1868) L. R. 3 H. L. 330.

(3) (1876) 2 App. Cas. 95.

(2) (1874) L. R. 19 Eq. 115.

(4) (1879) 11 Ch. D. 782.

(5) [1916] 2 Ch. 459.

apparent. The right to enjoy the water passed to the plaintiff as an easement or quasi-easement: *Wheeldon v. Burrows*. (1) In the case of an artificial watercourse, the origin of which is unknown, it can properly be inferred from the user of the water and other circumstances that the artificial watercourse was made upon the condition that the owners of land through which it passes should have the same rights as if it was a natural watercourse: *Baily & Co. v. Clark, Son & Morland*. (2) That case was followed in *Whitmores (Eden-bridge), Ltd. v. Stanford*. (3) The right to use the water flowing in an artificial watercourse in such a case is recognized in *Lewis v. Meredith* (4), and held to pass under the general words implied in a conveyance. The present case is therefore distinguishable from *Arkwright v. Gell* (5) and *Burrows v. Lang*. (6) The right claimed is more easy to establish when the works are of a permanent character, as they are in this case. Thus in *Watts v. Kelson* (7) the watercourse was held to be a continuous easement, and the right to have the accustomed flow of water passed by implication.

Again, the plaintiff has a prescriptive right to the flow of the water: *Magor v. Chadwick* (8), when it was pointed out that in this regard the law of watercourses is the same whether natural or artificial.

[LAWRENCE L.J. That is directly contrary to *Arkwright v. Gell*. (5)]

In *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (9) the correctness of the proposition was questioned, but the rights in regard to artificial watercourses are at any rate analogous to those in regard to a natural watercourse. Lastly, as regards the claim against the defendant in respect of the flooding of the plaintiff's ground, it is not right to rely on cases relating to water overflowing from mines, for mines are treated in a special manner: *Salmond on Torts*, 7th ed., p. 354. Mining cases are in a class by themselves, and when

(1) 12 Ch. D. 31, 49.

(5) 5 M. & W. 203.

(2) [1902] 1 Ch. 649, 663, 668.

(6) [1901] 2 Ch. 502.

(3) [1909] 1 Ch. 427.

(7) (1871) L. R. 6 Ch. 166.

(4) [1913] 1 Ch. 571.

(8) (1840) 11 Ad. & E. 571, 585

(9) (1878) 4 App. Cas. 121, 127.

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 — an owner digs a trench and cuts springs in doing so and fills up so as not to allow the existing flow in subterranean water channels to continue, he is, it is contended, liable for damage caused by the overflow: see *Hurdman v. North Eastern Ry. Co.* (1)

[He also referred to Salmond on Torts, 7th ed., p. 326, and Coulson on the Law of Waters, pp. 102, 212.]

Harold Christie replied on the new cases cited.

Cur. adv. vult.

July 29. LAWRENCE L.J. delivered a written judgment in which, after stating the facts as above set out, he continued: The first and main question to be determined on these facts is whether the defendant is bound to continue to allow the whole of the water which formerly flowed into tank Z and was not consumed by cattle or horses grazing on the blue land to overflow on to the pink land. The plaintiff claims to be entitled to the continuance of such overflow by grant as successor in title to the grantee under the conveyances of March 25 and August 25, 1919, and in the alternative by prescription as owner of the farm and the cottages numbered 2 and 3 on the plan which lie to the south of the pink land.

Dealing first with the claim based on the conveyances of 1919. By virtue of s. 62 of the Real Property Act, 1925 (which replaces s. 6 of the Conveyancing Act, 1881, and applies to all conveyances executed after December 31, 1881), a conveyance of land and buildings is deemed and operates to include (inter alia) waters, watercourse, liberties, privileges, easements, rights and advantages occupied or enjoyed with the land or buildings conveyed. The property comprised in the conveyance of March 25, 1919, consisted of a cottage and garden situate on the south side of and abutting upon the natural stream into which the overflow from tank Z was discharged. The cottage depended for its water supply upon the water flowing in the stream, and the occupiers were accustomed to draw the water required by them for domestic

use and consumption from the dipping place D, which was immediately outside the garden gate.

Mr. Gorst, on behalf of the plaintiff, relied on the rule stated by Thesiger L.J. in *Wheeldon v. Burrows* (1) in the following words: "On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted." In view of the facts of the present case, this rule does not in my judgment assist the plaintiff, because the overflow from tank Z was not an easement used by the owner of the entirety for the benefit of the part granted within the meaning of the rule. Tanks Y and Z were constructed simply for the purpose of supplying drinking water for the cattle and horses grazing on the blue land, and the artificial watercourse from the stone wall to point A was obviously constructed for the sole purpose of disposing of the surplus water from tank Z without rendering the pink land boggy and unfit for cultivation. The conveyance of the cottage only operated to pass such rights as had been enjoyed under circumstances leading to an expectation of the continuance of that enjoyment (see *Birmingham, Dudley and District Banking Co. v. Ross* (2)), and as there could be no expectation that the overflow from tank Z would be continued if that tank were done away with, the purpose of the overflow was merely temporary and the grantee of the cottage acquired no easement either by implied grant or under the general words of the Law of Property Act, 1925, s. 62, to have it continued for his benefit. The overflow from tank Z was not necessary to the reasonable enjoyment of the cottage, as the sources of the natural stream, according to the lowest estimate, produce a constant flow of at least eight gallons per minute and much more in wet weather, quite independently of the overflow

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(1) 12 Ch. D. 31, 49.

(2) (1888) 38 Ch. D. 295, 307.

LAWRENCE from tank Z, a supply more than adequate for such enjoyment.

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In these circumstances, although the overflow from tank Z whilst it lasted substantially increased the flow of water in the natural stream, such increase depended upon the will of the owner of tank Z, and being precarious it was not an easement occupied or enjoyed with the cottage at the date of the conveyance within the meaning of s. 62, nor would the right to the continuance of the overflow pass to the grantee under the other general words in s. 62, as the only privilege or advantage enjoyed with the cottage as regards the overflow was the permissive user of the water so overflowing so long as the owner of the blue land did not choose to stop it: see *Burrows v. Lang*. (1)

The cases of *Watts v. Kelson* (2) and *Schwann v. Cotton* (3) are, in my opinion, distinguishable from the present on the facts. In the former case, the watercourse was constructed by the common owner for the benefit of both tenements, and in the latter the pipe was laid by the common owner for the sole benefit of the tenement granted.

As regards the property comprised in the conveyance of August 25, 1919, the plaintiff's case is much weaker. It would be absurd to suggest that the overflow from tank Z was provided either for the joint benefit of both tenements or for the sole benefit of the tenement granted, as the latter was already suffering from an excess of water percolating into it from the tenement retained by the grantors. The conveyance did not reserve to the grantors the right to pour the surplus water from tank Z on to the land conveyed, and it may well be that the grantee would have had the right to restrain the grantors from continuing the overflow, but I fail to see how it could reasonably be said that because at the time of the conveyance the grantors for their own convenience were getting rid of the surplus water from tank Z by pouring it on to the land comprised in the conveyance, therefore the conveyance operated to compel them to continue to pour such surplus water on to the land conveyed for the benefit

(1) [1901] 2 Ch. 502.

(2) L. R. 6 Ch. 166.

(3) [1916] 2 Ch. 459.

of the grantee, although the grantors might at any time require to use such surplus water themselves.

In the result of this part of the case, I have come to the conclusion that neither the conveyance of March 25, 1919, nor the conveyance of August 25, 1919, operated to convey to the grantee the right to compel the grantors to continue the overflow of water from tank Z.

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I now turn to the claim made by the plaintiff that he is entitled to insist on the continuance of the overflow from tank Z by prescription. This claim is based on the fact that the plaintiff is owner of land situate on the southern bank of the natural stream below the point where the overflow from tank Z was discharged into it. It is not disputed that as incident to such ownership the plaintiff is entitled to all the natural rights of a riparian owner in the stream as regards both user and flow. Nor is it disputed that the plaintiff may have acquired by prescription first the right to divert part of the water actually flowing in the stream into his farm buildings at the dipping place C in the manner and for the purpose already mentioned, and secondly the right to take water from the stream at dipping place D for the use of the occupiers of the cottages 2 and 3.

The rights thus possessed by the plaintiff undoubtedly entitle him to the unimpeded and unpolluted flow of the water for the time being actually forming part of the stream; and so long as the surplus water from tank Z was given to the stream so as to become part of it no distinction could be made between the water naturally flowing in the stream and the added water: see per Pollock C.B. in *Wood v. Waud*. (1) But the question is whether the plaintiff is entitled by prescription to the further right of compelling the defendant to continue to augment the water naturally flowing in the stream by adding to it the overflow from tank Z.

It is necessary to bear in mind that the present case is not a case as to the rights inter se of riparian owners in respect of an artificial watercourse created by a third party, as in *Wood v. Waud* (2), but is a case in which the plaintiff claims

(1) 3 Ex. 748, 779.

(2) 3 Ex. 748.

LAWRENCE the right to the permanent flow of water in an artificial water-
 L.J. course created by the predecessor in title of the defendant for
 1931 his own purposes on his own land. In *Greatrex v. Hayward* (1)
 BARTLETT (a decision very much in point in the present case) Parke B.
 v. said (2): "The right of the party to an artificial watercourse,
 TOTTENHAM. as against the party creating it, must depend upon the
 character of the watercourse, and the circumstances under
 which it was created. This watercourse" (which had in
 fact been constructed upwards of fifty years before action
 brought) "is clearly of a temporary nature only, and is
 dependent upon the mode which the defendant may adopt
 in draining his land. This is the precise case which was put
 by this Court in *Wood v. Waud* (3), where it is said by the Court
 in the judgment, which underwent much consideration,
 that 'The flow of water from a drain, for the purposes of
 agricultural improvements, for twenty years, could not
 give a right to the neighbour so as to preclude the
 proprietor from altering the level of his drains for the greater
 improvement of his land. The state of circumstances in such
 cases shews that one party never intended to give, nor the
 other to enjoy, the use of the stream as a matter of right.'"

Stirling L.J. in *Baily & Co. v. Clark, Son & Morland* (4)
 said that in ascertaining the rights in respect of an artificial
 watercourse there must be taken into account, "first, the
 character of the watercourse, whether it is temporary or
 permanent; secondly, the circumstances under which it was
 presumably created; and, thirdly, the mode in which it
 has been in fact used and enjoyed." Moreover, as pointed out
 by Pollock C.B. in *Wood v. Waud*, by Palles C.B. in
M'Evoy v. Great Northern Ry. Co. (5), and by Farwell J. in
Burrows v. Lang (6), it is more difficult to presume an agree-
 ment as to enjoyment when a watercourse is constructed
 entirely over the land of the person constructing it than in
 the case of water discharged over the land of a neighbour,
 the reason being that in the latter case one could more readily

(1) 8 Ex. 291.

(2) Ibid. 293.

(3) 3 Ex. 748, 778.

(4) [1902] 1 Ch. 649, 668.

(5) [1900] 2 I. R. 325.

(6) [1901] 2 Ch. 502.

presume that there was an arrangement that the flow of the water should be for the benefit of both, whereas no such presumption arises where the water is conducted by a man entirely over his own land.

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Applying the principles laid down in the authorities to which I have referred to the facts of the present case, it is plain that the artificial watercourse was made for a temporary and not for a permanent purpose. The meaning of temporary purpose in this connection is not confined to a purpose which may happen in fact to last only for a short time, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end : per Farwell J. in *Burrows v. Lang*. (1) In *Arkwright v. Gell* (2) it was held that the fact that the water pumped from mines had flowed over a man's land for upwards of sixty years gave him no right to the continuance of the flow. In the present case the artificial watercourse was (as already stated) constructed entirely for the purpose of getting rid of the overflow from the drinking trough on the blue land. That purpose is in my judgment a temporary purpose limited to the period during which the owner of the blue land should require to maintain a drinking trough on that land and not to make use of the surplus water flowing out of that trough. If the blue and pink land had, at the time when the drinking trough was constructed, belonged to different owners the owner of the blue land would in the course of time have acquired an easement to discharge the overflow on to the pink land, but the acquisition of such an easement would not have subjected the dominant tenement to a counter-easement for the benefit of the servient tenement, as the drinking trough was constructed solely for the benefit of the dominant tenement. Moreover, the user by the plaintiff and his predecessors in title of the water flowing in the artificial watercourse after that water had become part of the water flowing in the natural stream was not a user as of right, but was consistent only with a permission by the defendant and her predecessors in title to enjoy what they did not want, and so long as they

(1) [1901] 2 Ch. 508.

(2) 5 M. & W. 203.

LAWRENCE were minded to continue the overflow. Such a user never
L.J. could have been as of right in its inception and could never
1931 acquire during its continuance any higher than a permissive
BARTLETT character, and it therefore never could be or become a
v. foundation for the presumption of a grant: see per
TOTTENHAM. FitzGibbon L.J. in *Hanna v. Pollock*. (1)

For these reasons I am of opinion that the claim to the continuance of the overflow from tank Z by prescription fails. It follows, therefore, that the plaintiff is not entitled to the declaration claimed in para. 1 of the prayer of the statement of claim, nor to the injunction claimed in para. 2.

There remains the question whether the plaintiff is entitled to any relief in respect of water discharged on to the surface of the pink land at the place where the arrows are marked on the plan and on to the grass verge of the high road above the plaintiff's new entrance to his rickyard. The claim in respect of both these matters, which is based on the rule in *Fletcher v. Rylands* (2), has, in my opinion, no real substance.

In the first place, that part of the pink land where the arrows are marked has always been more or less boggy, and (as already stated) a further earthenware drain was laid down there some eight or nine years ago. The water naturally percolating at this particular place from the blue land has, in the past, been troublesome, the more so no doubt because the ditch which formerly existed along the south side of the wall has been allowed to become choked up and ineffective. However that may be, it is evident that the pink land not only at this spot but elsewhere cannot be utilized effectively for cultivation unless and until it is properly drained, which at present it certainly is not. With regard to the water discharging on to the grass verge of the high road at the corner of the plaintiff's shed, it is admitted that there has always been a discharge from the surface of the blue land at this point in winter and in wet weather. The plaintiff has never been able to use entrance E with carts except in the summer months in dry weather. It is obvious that the grass

(1) [1900] 2 I. R. 664, 671.

(2) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 330.

verge is not a suitable approach to an entrance to be used for LAWRENCE
carts. Further it is obvious that the entrance could be L.J.
rendered suitable for carts at all times at a trifling expense by 1931
laying a short length of drain pipe across it similar to the one BARTLETT
which has been laid across the old entrance to the south. v.
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In these circumstances I confess to feeling somewhat disinclined to embark upon a lengthy examination of all the authorities cited by counsel on the question whether the defendant is under any liability for the alleged damage to the plaintiff's land owing to the discharge of water at the two places I have mentioned. Broadly the rule in *Fletcher v. Rylands* (1) applies only to things artificially brought or kept upon the defendant's land, and has no application to things which are naturally there. Even in the case where things are artificially brought or kept upon the defendant's land, questions may arise whether the defendant is liable to his neighbour for their escape if he is only putting his land to its natural use. An illustration of the difficulty of determining what is the natural, as distinguished from the non-natural user of land in this connection, is to be found in the alternative ground for the decision in *Rickards v. Lothian*. (2)

The present case, however, is not concerned with the escape of water which the defendant has either brought upon or kept upon her land. There is no escape on to the plaintiff's land of any of the water collected by the defendant in tank Z and flowing in the 2-inch pipe to the ram-chamber. The only complaint of the plaintiff is that owing to the manner in which the works were executed by the defendant, the water under the surface of her land has been tapped to a certain extent and now percolates on to a particular part of the pink land and on to the verge of the high road in a more concentrated form.

The defendant made a temporary trench for the purpose of placing the 2-inch pipe leading from tank Z to the ram-chamber underground and filled in that trench when that pipe was laid. It is not suggested that the defendant adopted

(1) L. R. 1 Ex. 265; L. R. 3 H. L. 330.

(2) [1913] A. C. 263.

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any unusual method in laying the pipe or that the work was done otherwise than carefully and skilfully. It is said that in digging the trench the workmen "cut into" several underground springs, and that some of the water thus tapped flowed along the trench before it was filled in and continued to do so afterwards, discharging on to the verge of the high road at the corner of the plaintiff's shed, and that some of it percolated and continued to percolate on to the pink land at the place where the arrows are marked on the plan. All this water previously to its diversion was finding its way by gravitation and percolation into or on to some part of the plaintiff's land, and the fact that owing to the natural and proper user by the defendant of her own land some of the water in the water-bearing stratum below the surface has, to a small extent, been diverted does not in my opinion entitle the plaintiff to damages for any alleged injury arising from such diversion: see *Wilson v. Waddell* (1) and *West Cumberland Iron and Steel Co. v. Kenyon*. (2) The present is not a case where an owner of land has diverted water flowing in a defined channel on to his neighbour's land or where an owner has erected an artificial structure on his land which causes water which formerly did not pass on to his neighbour's land, to be poured on to that land so as substantially to interfere with his enjoyment. The case of *Hurdman v. North Eastern Ry. Co.* (3) is distinguishable from the present in that there the defendants had artificially raised the level of the ground next to the plaintiff's house and had thereby caused rain water which would otherwise have drained into the defendant's land to percolate into the plaintiff's house and cause substantial damage. In the present case, the defendant has neither diverted any defined watercourse nor altered the level of her land nor erected any structure upon it so as to cause rain water which would ordinarily soak into her ground to pass on to the plaintiff's land. Moreover, on the evidence I find that the water of which the plaintiff complains does not substantially interfere with the enjoyment of his property.

(1) 2 App. Cas. 95.

(2) 11 Ch. D. 782.

(3) 3 C. P. D. 168, 173.

For these reasons I am of opinion that the plaintiff is not entitled to the relief claimed in paras. 3 and 4 of the prayer of the statement of claim. In the result the whole action fails and must be dismissed with costs.

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Solicitors: *Stow, Preston & Lyttelton, for Wilkins, Toy & Farrant, Chipping Norton; Timbrell, Deighton & Nichols, for Marshall & Eldridge, Oxford.*

H. C. G.

In re HADDEN.

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[1931. H. 1600.]

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Charity — Trust — Charitable Purposes — Will — Construction — Open-air Recreation for Working People—No Limitation of Locality—Legislative Recognition of Means for Public Recreation as a Charitable Object—Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42), s. 6, s. 13, sub-s. 2—Preamble to Statute 43 Eliz. c. 4.

A testator by his will dated April 30, 1929, gave the residue of his estate to trustees upon trust to make certain payments thereout and (by clause 14 of his will) directed that they should hold the ultimate residue "to be expended in some scheme or schemes to be approved by my trustees for the benefit in the cities of Vancouver and if in the opinion of my trustees there is some equally deserving object of the nature hereinafter indicated of Nottingham or other places of the working people such as playing fields parks gymnasiums or other plans which will give recreation to as many people as possible but as regards Vancouver I would not exclude some educational purpose being considered by my trustees." By a preceding clause (clause 13) the testator had made a disposition of certain moneys, in certain events, in the following terms: "Upon trust for any scheme to be approved by my trustees of a national character excluding hospitals and works of an educational character. Without binding my trustees I would prefer a scheme which would give open-air recreation to as large a number of people as possible."

The testator died on February 14, 1931, leaving ultimate residue of the value of about 35,000*l.* :—

Held, (1.) that upon the true construction of the will, the dominant object of the testator was the health and welfare of the working classes, and that the benefits authorized by clause 14 were the supply of healthy recreation, mainly in the open air and in particular by providing playing fields, parks and gymnasiums; and (2.) that through legislative recognition

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indicated by the Mortmain and Charitable Uses Act, 1888, s. 6, of the dedication of land to the public for recreation as a charitable object, the provision of means for public recreation was a charitable object within "the meaning, purview and interpretation" of the preamble to the Statute 43 Eliz. c. 4: see Mortmain and Charitable Uses Act, 1888, s. 13, sub-s. 2.

Accordingly, the trusts expressed in clause 14 of the will were valid charitable trusts.

ADJOURNED SUMMONS.

Harvey Hadden by his will dated April 30, 1929, gave the residue of his estate both real and personal to trustees upon trusts to pay his debts and certain legacies thereinbefore bequeathed and to set aside a sum of 100,000*l.*, which he proceeded to settle. Then by clause 14 of his will, the testator directed that, subject to those trusts, his trustees should hold the ultimate residue upon trust "to be expended in some scheme or schemes to be approved by my trustees for the benefit in the cities [*sic*] of Vancouver and if in the opinion of my trustees there is some equally deserving object of the nature hereinafter indicated of Nottingham or other places of the working people such as playing fields parks gymnasiums or other plans which will give recreation to as many people as possible but as regards Vancouver I would not exclude some educational purpose being considered by my trustees."

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An originating summons was taken out by the plaintiff, one of the present trustees of the will (the other trustee, the defendant More, not being represented at the hearing) for the determination of (amongst other questions) the question whether the trusts declared by clause 14 of the will were valid charitable trusts or were void.

A. H. Droop for the plaintiff.

Lionel Cohen K.C. and *Wilfrid Hunt* for some of the next of kin. This is not a valid charitable trust. In the first place, the purposes specified are too vague and indefinite. The trustees are given the widest discretion in their selection of the means by which the objects of the trust are to be benefited. Upon the true construction of clause 14, the means which are specifically mentioned—namely, by providing playing fields, parks and gymnasiums, are not exhaustive; they are merely intended to indicate by way of illustration some of the means by which the objects of the trust are to be benefited. “Other plans” would authorize the trustees to provide outdoor recreation by means other than those specifically alluded to; as, for instance, dog-racing and indoor recreation, which might include cinemas and variety shows. And, by implication, it would seem that, except in the case of Vancouver, recreation of an educational type is ruled out by the testator: *Blair v. Duncan* (1); *Houston v. Burns*. (2) True, there may be a gift for the benefit of a defined locality for public purposes which, though distinguishable from charitable purposes in the popular sense of the word, may yet be charitable purposes within the purview of the preamble to the Statute of Elizabeth: *Dolan v. Macdermot* (3); *In re Allen*. (4) But here, even assuming that the locality is sufficiently defined, which is denied, the description of the purposes is so indefinite and vague that the trustees might, if they chose, apply the legacy according to some scheme wholly outside the purview of that preamble. If the class of objects includes purposes which are not charitable in the technical legal sense of that term, and in favour of which the trustees have the option of applying the legacy, then the class of objects is too indefinite, and the trust is void on the ground of uncertainty: *In re Tetley* (5); *In re Davis* (6); *Attorney-General v. National Provincial Bank*. (7) A trust for a specific purpose which is shown to be of public general

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(1) [1902] A. C. 37.

(4) [1905] 2 Ch. 400, 406.

(2) [1918] A. C. 337, 349.

(5) [1923] 1 Ch. 258.

(3) (1867) L. R. 5 Eq. 60.

(6) [1923] 1 Ch. 225.

(7) [1924] A. C. 262, 264.

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utility is generally upheld; yet it does not follow that a general trust for purposes beneficial to the community, without specifying any particular charitable purpose, will be good, for the reason that such a trust might include a purpose of public general utility which is not charitable: *Inland Revenue Commissioners v. Yorkshire Agricultural Society*. (1) In *Dunne v. Byrne* (2) it was in the discretionary power of the Archbishop to apply the fund for purposes which were not legally charitable; and accordingly the gift was void for uncertainty: see also *In re Stratton*. (3) Even if it could be said that the area within which the purposes are to be pursued is sufficiently defined, the fault of vagueness in stating the purposes is not cured by the specification of the locality to be benefited, and the trust is void for uncertainty as regards the specification of the purposes which the testator was minded to promote. "Local connection cannot limit the area of selection of purpose, unless the reference of the testator is to persons, societies, agencies, or institutions actually existing or projected to be established in a particular district": per Lord Shaw of Dunfermline, *Houston v. Burns* (4); and local limitations are not sufficient to render charitable within a prescribed area trusts which are not charitable in the world at large: *In re Gwyon*. (5) Here, so far from the locality being limited, it is unrestricted. There is nothing to prevent the trustees from applying the fund in any part of the world they think fit. The locality is so undefined that the trust cannot be brought within the statement of Lord Selborne in *Goodman v. Mayor of Saltash*. (6) Even assuming the locality to be sufficiently defined and the purposes of the trust to be defined with sufficient certainty, still there is nothing to exclude the mere encouragement of sport as means which the trustees are at liberty to adopt for benefiting the objects of the trust. The adoption of such means, even though indirectly beneficial to the public at large, would not be favoured by the law on the ground of charity: *In re Nottage*. (7)

(1) [1928] 1 K. B. 611, 636.

(2) [1912] A. C. 407.

(3) [1930] 2 Ch. 151; [1931] 1 Ch.
197.

(4) [1918] A. C. 337, 349.

(5) [1930] 1 Ch. 255, 261.

(6) (1882) 7 App. Cas. 633, 642.

(7) [1895] 2 Ch. 649.

Further, there must be a sufficient degree of certainty, not only in regard to the purposes of the trust, but also as regards the class of persons intended to be benefited. The phrase "working people" is vague and indefinite. The class intended to be benefited cannot, within the language or the spirit of the preamble to the Statute of Elizabeth, be sufficiently identified with any of the objects specified in the list contained in that preamble, nor can the class of working people be properly described as poor people within the meaning of that statute: *In re Drummond*. (1) True, the element of poverty is not an essential element: see as to this per Lindley L.J. in *In re Macduff* (2) and *Verge v. Somerville* (3); yet the class of persons is too vaguely defined. The gift is not for general public purposes to be applied for the benefit of a particular section of the public, as in *In re Melody*. (4) Nor is the benefit limited to the inhabitants of a town or to any particular class of such inhabitants so as to make the trust a charitable one within the statement by Lord Selborne in *Goodman v. Mayor of Saltash* (5), which is not distinguishable from *In re Christchurch Inclosure Act*. (6)

Charles R. R. Romer (Cleveland-Stevens K.C. with him) for the testator's widow. It is open, upon the proper construction of the trust in question, to the trustees in their discretion to select an object which is not within the category of objects specified, but one which is not legally recognized as a charitable object. Therefore, according to a long list of authorities, the trust must fail.

Stafford Crossman for the Attorney-General. The trusts in clause 14 must be construed in the light thrown upon them by the preceding clause (clause 13), which makes it clear that public open-air recreation was the dominant object the testator had in view. That object comes within the purview of the preamble to the Statute of Elizabeth, which this Court is in the habit of interpreting in the widest sense. The testator's aim was to provide the working classes

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(1) [1914] 2 Ch. 90.

(2) [1896] 2 Ch. 451, 464.

(3) [1924] A. C. 496.

(4) [1918] 1 Ch. 228.

(5) 7 App. Cas. 633, 642.

(6) (1888) 38 Ch. D. 520.

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anywhere with opportunities of obtaining healthy recreation. The enumeration of charitable purposes in the Statute of Elizabeth is not exhaustive. The Courts have taken a liberal view when examining the purposes of any particular trust: *In re Foveaux*. (1) A standard as to what are charitable purposes is afforded by the preamble to that Statute, and from the list therein contained it can by analogy be deduced that certain other purposes are also to be treated as charitable: per Rigby L.J. in *In re Macduff*. (2) The trust in dispute comes within the purview of "the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed" mentioned in the list in the preamble. Upon the fair construction of the will the purposes are charitable public purposes. The testator gives examples of some of the methods by which healthy recreation may be obtained for the benefit of the objects referred to, and they are consistent with a charitable public purpose. The instances given are sufficient to justify the adoption of other means of a similar kind. The words used are "other plans," which ought to be construed as "ejusdem generis" as the examples specified. The Irish case of *Shillington v. Portadown U. D. C.* (3) strongly supports the view that this is a valid charitable trust. The Recreation Grounds Act, 1859, s. 7, permitted a bequest of money of a limited amount for the purchase and upkeep of public recreation grounds; a bequest which, but for that enabling Act, would have been void under the Mortmain Act. Further, by s. 6 of the Mortmain and Charitable Uses Act, 1888, an assurance by will of land of a limited quantity for the purposes of a public park, which included any park, garden or other land dedicated to the recreation of the public, was exempted from the provisions of Parts I. and II. of that Act. The legislature has thereby recognized the provision of public recreation grounds as good charitable objects. The restriction of the benefit to a limited class, provided it be a substantial class, as in the present case, does not render the trust less a charitable one: *Goodman v. Mayor of*

(1) [1895] 2 Ch. 501.

(2) [1896] 2 Ch. 451, 464.

(3) [1911] 1 I. R. 247.

Saltash (1), referred to by Lindley L.J. in *In re Christchurch Inclosure Act*. (2) The discretion of the trustees is here limited to their selection among charitable objects. In *Houston v. Burns* (3) the trustees had a discretion to apply the fund for purposes which were public purposes but not charitable. In *In re Nottage* (4) the only object was the mere encouragement of yacht racing, which did not directly benefit the community. So too, and on similar grounds, it was held in *In re Clifford* (5) that a gift to an Angling Society could not be supported as a charitable gift, and in *In re Patten* (6) that a legacy to the Sussex County Cricket Club could not be supported, the object being to encourage cricket and nothing else. In *In re Drummond* (7) the trust was for the benefit of private individuals.

Lionel Cohen K.C. replied. In *In re Nottage* (4) Lindley L.J. said that every healthy sport was good for the nation, cricket, football, etc., or any other healthy exercise, but if it had been the idea of the lawyers that a gift for the encouragement of such exercises was therefore charitable, one should have heard of it before. *Shillington v. Portadown U. D. C.* (8) is difficult to reconcile with *In re Nottage*. (4) It is pointed out in Tudor on Charities, 5th ed., p. 42, that although in *Shillington v. Portadown U. D. C.* (8) healthy recreation for the inhabitants of a town was held to be a good charitable object: in English cases sport, except as an incident of general education (see *In re Mariette* (9)), had not been so regarded.

Cur. adv. vult.

Oct. 20. CLAUSON J. Harvey Hadden died on February 14, 1931, having by his will, dated April 30, 1929, made a disposition in clause 13 of certain moneys in certain events in the following terms: "Upon trust for any scheme to be approved by my trustees of a national character excluding

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(1) 7 App. Cas. 633, 642.

(2) 38 Ch. D. 520, 530.

(3) [1918] A. C. 337.

(4) [1895] 2 Ch. 649.

(5) (1911) 106 L. T. 14.

(6) [1929] 2 Ch. 276, 289.

(7) [1914] 2 Ch. 90.

(8) [1911] 1 I. R. 247.

(9) [1915] 2 Ch. 284.

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hospitals and works of an educational character. Without binding my trustees I would prefer a scheme which would give open-air recreation to as large a number of people as possible." I have not to deal now with that provision. I refer to it merely as showing that the testator was interested in the matter of popular healthy recreation. Clause 14 of his will, which is the clause I have to construe, is as follows : [His Lordship then read that clause and continued :] The question I have to decide is whether by this clause a valid charitable trust is created. If it is, I am asked to direct a reference to chambers to settle a scheme. If it is not, I am asked to declare that the testator died intestate as to his residue.

The clause is very awkwardly expressed. It is suggested that on its true construction it creates a trust to apply the fund for the benefit of working people without any geographical limit and without any limit or definition as to the manner of benefiting them, the reference to "playing fields, parks, gymnasiums or other plans which will give recreation to as many people as possible" being, so it is suggested, the mere giving of instances of authorized means of benefiting the people, without excluding the adoption of any other means which the trustees may select. It is obvious that if this be the true construction of the clause, there are grave difficulties in the way of upholding the trust as a valid trust. I need refer only to *Blair v. Duncan* (1) ; *Houston v. Burns*. (2)

In my judgment, the construction so suggested is not the correct construction. The last two lines of the clause seem to me to indicate that the direction that as regards Vancouver the trust may be extended so as to include some educational purpose implies that save as regards Vancouver the trust is to be limited to the provision of benefits such as "playing fields, parks, gymnasiums or other plans which will give recreation to as many people as possible." The expression "such as" cannot, in my judgment, be read as stating merely certain examples of the benefits which can be provided. The words seem to me, in the context, to limit the benefits to

(1) [1902] A. C. 37.

(2) [1918] A. C. 337.

playing fields, parks, gymnasiums and other "plans" which will give recreation to as many people as possible. The expression "plans" is a curious one, but I think that I can, with the aid of clause 13, fairly paraphrase the class of benefits which the testator authorizes by clause 14 as being benefits which supply healthy recreation mainly or chiefly in the open air, and in particular by means of the provision of playing fields, parks, and gymnasiums.

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Finding, as I thus do, that the objects of the trust are thus expressed and defined with reasonable clarity, there is nothing in the cases to which I have already referred to prevent my holding the trust to be valid; but as it is obvious that the trust is to be permanent, the rule against the creation of a perpetuity will prevent my holding the trust valid, unless I can hold it to be charitable in the legal sense. I have been referred to a decision of Barton J. in Ireland in *Shillington v. Portadown U. D. C.* (1) In that case it was held that the purpose of providing the means of healthy recreation for the inhabitants of a particular town was a charitable purpose. It may be suggested, however, that the fact that in that case the charitable purpose was limited to a defined area differentiates that case from the present. There does not appear to be any other reported case which I can take as a guide on this point. Reference was, however, made to the Recreation Grounds Act, 1859, which is undoubtedly a legislative recognition of the desirability of providing public recreation grounds and playgrounds. It was suggested that that Act necessarily implies that such a provision would be charitable. It is not, however, necessary that I should express an opinion on the point, for the Mortmain and Charitable Uses Act, 1888, s. 6, affords me a surer and clearer guide. That section enacts that Part II. of the Act, which relates to assurances to charitable uses, shall not apply to an assurance of a limited amount of land for the purposes of a park, garden, or other land dedicated or to be dedicated to the recreation of the public. That enactment seems to me necessarily to involve that in the

(1) [1911] 1 I. R. 247.

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view of the legislature dedication of land to the recreation of the public is dedication to a charitable use; and in face of that enactment I am, I conceive, bound to hold (nor am I at all reluctant so to do) that the provision of means for public recreation is a charitable object within "the meaning, purview and interpretation" of the preamble to the Act of 43 Eliz. c. 4: see s. 13, sub-s. 2, of the Mortmain and Charitable Uses Act, 1888. In other words, I hold that the trust declared by clause 14 of the will before me is a valid charitable trust.

Out of respect to the arguments of counsel, I ought to add that I am of opinion that the fact that the provision of prizes and like means for the mere encouragement of sport has been held not to be a charitable purpose (see *In re Nottage* (1)) offers no obstacle in the way of my conclusion. I see no trace in the present will of a desire to encourage mere sport; the health and welfare of the working classes is obviously the dominant object in the testator's mind. Nor can I see that any difficulty arises from the fact that the testator contemplates that the beneficiaries should be working people, that is to say, using the term in the popular though inaccurate sense, members of a social class who are not likely to have satisfactory facilities for similar recreation within the curtilages of their own houses. It is surely far too late in the day to suggest that, in so far as it may be necessary that the element of public benefit should be inherent in the trust if it is to be held charitable, that element is not secured by the direction that working people generally are to be the beneficiaries.

For the reasons which I have endeavoured to explain I shall declare the trust expressed in clause 14 to be a valid charitable trust, and direct a reference to chambers to settle a scheme for the administration of the trust.

Solicitors: *Charles Russell & Co.; Radcliffes & Hood, St. Barbe Sladen & Wing; Treasury Solicitor.*

(1) [1895] 2 Ch. 649.

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July 22.

Landlord and Tenant — Places of Worship (Enfranchisement) Act, 1920 (10 & 11 Geo. 5, c. 56)—Lease—Two Buildings—Trust Deed executed subsequently to Lease—Premises comprised in Lease held subject to trusts of deed for use as “Place of Worship”—Premises not wholly used as Places of Worship—Notice by Lessees to Lessors to treat for Sale of Reversion—Meaning of “Public Worship” and “Place of Worship.”

Two tenements known respectively as “the Salvation Army Hall” or “the Citadel of the Salvation Army, Weston-super-Mare” and “the Young People’s Hall” and comprised in one lease were held under a trust deed executed after the lease upon trust to be used as a place of worship. The Salvation Army Hall was in fact used for religious worship: the rooms in the upper part of the Young People’s Hall were used for teaching. The two buildings were separated by a yard. The lessees, in pursuance of the powers given by the Places of Worship (Enfranchisement) Act, 1920, gave to the lessors notice in writing requiring the lessors to treat contract and agree with the lessees for the sale to the lessees of all the lessors’ estate and interest in the premises (subject to the provisions of the Act) and to give particulars of the lessors’ estate and interest in the premises and of their claims in respect thereof and of their claim for compensation. The lessors contended that under the trust deed the premises demised by the lease were not held on trust for the purposes of a place of worship, either at the date of the notice or at the date of the Act. In an action by the lessors claiming a declaration that the lessees were not entitled, under the Act or otherwise, to acquire the freehold reversion in all or any part of the premises, and an injunction to restrain them from proceeding under the notice:—

Held, (i.) that “public religious worship” may include worship to which, on any or all occasions, only certain sections of the public are admitted;

(ii.) that a trust for the use of premises for the purposes of public religious worship is carried out although minor parts of the premises are not so used.

WITNESS ACTION.

By a lease (hereinafter called “the lease”) dated September 29, 1881, and made between Edward Ulvidale Corbett Bond of the one part and William Booth, General of the Salvation Army (hereinafter called “General Booth”), of the other part certain land and premises situate in Carlton Street, Weston-super-Mare, with all rights of way and appurtenances thereto belonging were demised to General Booth for fifty years from September 29, 1881, at the yearly rent of 40*l.* and subject to the covenants and conditions

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therein contained, including a clause by which the said Edward Ulvidale Corbett Bond gave full powers to General Booth his executors administrators or assigns to build a room to be used entirely for the services of the Salvation Army. The lease, however, contained no covenant or other obligation on General Booth to build or use any such room.

In 1930 the premises comprised in the lease were two separate and distinct parcels—namely, a building known as “the Salvation Army Hall” or as “the Citadel of the Salvation Army in Weston-super-Mare,” and another known as “the Young People’s Hall,” and having the inscription “Young People’s Hall” upon it. The Salvation Army Hall was used for the purposes of the Salvation Army in the sense of religious purposes. In the upper part of the Young People’s Hall, however, there were rooms used for purposes other than religious, being in fact used for teaching.

On July 3, 1930, the freehold reversion expectant on the lease was vested in the plaintiffs, Elizabeth Mary Annie Stradling, Gladys Hilda Stradling, and William John Dash, as executors of the will of Ernest Samuel Stradling.

By a notice dated July 3, 1930, signed by the defendants, Edward John Higgins, Henry William Mapp, and John Beaully Laurie, and addressed to the plaintiffs as personal representatives of the said Ernest Samuel Stradling, reciting the lease and that the premises therein comprised, being a place of worship within the Places of Worship (Enfranchisement) Act, 1920 (1), were then, by

(1) “Sect. 1 (1.) Where premises held under a lease to which this Act applies are held upon trust to be used for the purposes of a place of worship, whether in conjunction with other purposes or not, and the premises are being used in accordance with the terms of the trust, the trustees, notwithstanding any agreement to the contrary (not being an agreement against the enlargement of the leasehold interest into a freehold contained in a lease granted or made before the passing of this Act), shall have the

right as incident to their leasehold interest to enlarge that interest into a fee simple, and for that purpose to acquire the freehold and all intermediate reversions:

Provided that—

(a) if the premises exceed two acres in extent, the trustees shall not be entitled to exercise the right in respect of more than two acres thereof;

(2.) The leases to which this Act applies are leases (including underleases and agreements for leases

virtue of a deed dated June 23, 1930, and made between MAUGHAM J.
the said Edward John Higgins of the one part and all the
defendants of the other part (hereinafter called "the deed"),
vested in the defendants as trustees under the deed subject
to the said rents, covenants and conditions upon trust to be
used as a place of worship, and reciting that the same were
being used in accordance with the terms of that trust, the
defendants, in pursuance of the powers conferred on them
by the Places of Worship (Enfranchisement) Act, 1920

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or underleases), whether granted or made before or after the passing of this Act, for lives or a life or for a term of years where the term as originally created was a term of not less than twenty-one years, whether determinable on a life or lives or not.

Sect. 2. For the purpose of acquiring such reversionary interests as aforesaid, the Lands Clauses Acts shall apply as if the trustees had been authorised to acquire the premises by a special Act incorporating the Lands Clauses Acts and sections seventy-seven to eighty-five of the Railway Clauses Consolidation Act, 1845, subject, however, to the modifications set out in the Schedule to this Act, and to the following modifications:—

(a) All questions of disputed compensation shall be settled by a single arbitrator, who shall be appointed, and whose remuneration shall be fixed, in default of agreement, by the judge of the county court, and the arbitrator shall be deemed to be an arbitrator within the meaning of the Lands Clauses Acts, and the provisions of those Acts with respect to arbitration shall, subject to the provisions of this Act, apply accordingly:

(b) The consideration payable in respect of any intermediate

reversion may, at the option of the person entitled to that reversion, be an annual rent-charge for a term corresponding to the unexpired residue of the term of the reversion:

- (c) In determining the amount of any compensation the value of any buildings erected, or improvements made by the trustees, shall be excluded:
- (d) No allowance shall be made on account of the acquisition being compulsory:
- (e) In determining the amount of compensation in any case where the rent reserved under the lease is less than the full annual value of the land, the compensation, so far as it is payable in respect of the interest of the lessor expectant on the expiration of the term of the lease, shall not be ascertained on the basis of the rent so reserved, but, subject always to the foregoing provisions of this section, on the estimated full value of the land at the expiration of the term of the lease.

Sect. 3. The estate in fee simple acquired by the trustees shall be held by them upon the same trusts as those upon which the leasehold interest would have been held by

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enabling, gave notice to the plaintiffs that the defendants, as trustees under the deed, wished to exercise the right incident to the leasehold interest in the premises comprised in the lease to enlarge that interest into a fee simple and for that purpose wished to acquire the freehold reversion and all intermediate reversions (if any) in those premises. The notice required the plaintiffs to treat contract and agree with the defendants for the sale to the defendants of all the plaintiffs' estate and interest subject to the provisions of the Act, and to give particulars of their estate and interest in the premises and of their claims in respect thereof and of their claim for compensation.

them if it had not been enlarged into a fee simple, and shall be subject to all the same covenants and provisions relating to user and enjoyment and to all the same obligations of every kind other than the payment of rent as those to which the leasehold interest would have been subject if it had not been so enlarged, and all such covenants, provisions, and obligations shall be enforceable against the trustees and their successors in title by the persons who, but for the enlargement of the leasehold interest under this Act, would for the time being have been entitled to enforce such covenants, provisions, or obligations :

Sect. 4. If the person who was entitled to the freehold reversion in the lands at the time when the interest of the trustees in the lands was enlarged into a fee simple, or the successor in title of that person, proves to the satisfaction of the Charity Commissioners that any premises the estate in fee simple in which has been acquired by the trustees under this Act, or any part thereof, are let or are habitually used for any purpose or purposes other

than those specified in the trusts upon which the estate in fee simple is held the Commissioners shall, unless it appears to them that such use was due to inadvertence and will be discontinued, by order determine such letting or user, and for this purpose may declare void any contract for, and may prohibit by injunction the continuance of, any such letting or user, or may order that the premises or that part thereof shall be sold, and any order so made shall be enforceable by the same means and be subject to the same provisions as are applicable under the Charitable Trusts Acts, 1853 to 1894, to any orders made thereunder.

Sect. 5. In this Act, unless the context otherwise requires,—

The expression 'place of worship' means any church, chapel, or other building used for public religious worship, and includes a burial ground, Sunday or Sabbath School, caretaker's house or minister's house attached to or used in connexion with and held upon the same trusts as a place of worship :

The deed recited the lease, that the demised premises were vested in the said Edward John Higgins as General of the Salvation Army, and were required for, and were at the time in, use and occupation as a place of worship, and that the said Edward John Higgins was desirous of appropriating them for that purpose and declaring trusts of them accordingly. The deed then witnessed that in pursuance of that desire and in exercise of the powers vested in him for that purpose as General of the Salvation Army by virtue of a deed poll dated August 7, 1878 (hereinafter called "the Constitution Deed"), and the other deeds constituting the Salvation Army, and of all other powers enabling him in that behalf the said Edward John Higgins thereby assigned to all the defendants all the premises comprised in the lease for the term thereby granted and subject to the covenants and conditions therein contained upon trust at all times to cause or permit them to be used as and occupied for the purposes of a place of worship by and in accordance with the practice and doctrines of the Salvation Army and for such other purposes of the Salvation Army, not inconsistent with that use and occupation, as the General of the Salvation Army should from time to time determine. The deed provided that notwithstanding the trusts thereinbefore contained the premises should remain subject to all powers of selling, mortgaging and leasing vested in the General of the Salvation Army in relation to the Salvation Army's property under the Constitution Deed and the other deeds constituting the Salvation Army, and to be exercised by the trustees at the direction of the General for the time being of the Salvation Army.

The writ in this action was issued on January 9, 1931. The plaintiffs contended that under the deed the premises demised by the lease were not held in trust for the purposes of a place of worship within the Act, and were not so held either at the date of the notice or at the date of the Act: and they claimed a declaration that the defendants as trustees of the deed or otherwise as trustees or officers of the Salvation Army were not entitled, under the Act or otherwise, to acquire the

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freehold reversion in all or any part of the premises demised by the lease, and an injunction to restrain them from proceeding under that notice and from serving or proceeding under any other notice purporting to be given under the Act.

The defendants contended that the premises were held in trust for the purposes of a place of worship within the Act, and that they had been acquired by General Booth in 1881 for use as a place of worship and had ever since been so used. The defendants also stated that it was their intention that the premises should continue so to be used as long as there was a congregation to worship there.

Vaisey K.C. and *H. P. Chapman* for the plaintiffs. This is not a trust such as is contemplated. It would be a most extraordinary result of treating this group of buildings as a place of worship if the plaintiffs could be dispossessed and their lease thus be made to fall in. This group of buildings is not brought within the provisions of this expropriation Act. The Act ought to be strictly construed.

J. H. Stamp for the defendants. A place of worship is defined in the Act as "any church, chapel, or other building used for public religious worship." Under the Interpretation Act words in the singular shall include the plural, but if "building" were here read "building or buildings," the effect would be merely that the aggregate of a group of several buildings coming within the definition would be a "place of worship." It makes no difference if two areas, in such a case, have, instead of a party wall, two outside walls and a space between the areas. In such a case a place of worship is one place of worship with more than one centre of activity in it. On the evidence it is clear that, in a document dealing with the Salvation Army, "religious worship" refers to public worship. The word "public" has a very elastic meaning: and worship may be "public" without being open to all sorts of persons coming to the door.

Vaisey K.C. in reply.

MAUGHAM J. [having stated the facts:] I will begin by stating shortly the effect of the Places of Worship

(Enfranchisement) Act, 1920, so far as it is material for the present purpose. The Act is intituled: "An Act to authorise the enfranchisement of the sites of places of worship held under lease." Sect. 1, sub-s. 1, provides as follows: [His Lordship read the sub-section, and continued:] There are three provisoes, of which the first only need be noted. It is [His Lordship read the proviso, and continued:] The second sub-section defines the leases to which the Act applies, which for this purpose may be stated to be leases which were created for a term of not less than twenty-one years. The second section of the Act provides procedure for the acquisition of the reversionary interests by the incorporation of the sections of the Lands Clauses Act or the Railway Clauses Consolidation Act, 1845, subject to certain modifications. The third section of the Act seems to me somewhat important. It begins by providing that [His Lordship read the first provision of the section and continued:] I think that I need not read the rest of that section. Sect. 4 provides for the case of premises which ex hypothesi are subject to trusts to be used for the purposes of a place of worship ceasing to be so used, and in that case it gives power to the Charity Commissioners to require the trustees to sell the premises. It is in these terms: [His Lordship read the section, and continued:] Then in s. 5 I find an important definition: [His Lordship read the definition, and continued:] There for the first time I find the word "public" added to the phrase "religious worship," and the argument in this case has turned largely on the question whether I can properly find that the trusts contained in the deed are trusts which render it necessary for the premises to be used for public religious worship. I may add that counsel for the plaintiffs stressed the point that the Act may be used, very improperly, for the purpose of enabling astute persons to acquire the reversion on leasehold premises. It is suggested that shortly before the lease comes to an end, or at some other period, they might execute a trust deed which causes the premises to be held temporarily for the purposes of a place of public worship and, having thus complied with that

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part of the Act, they may then serve a notice to treat, acquire the freehold reversion, and then revert to the old condition of things, or in some way cause the premises to be used for some purpose other than that of public religious worship. I am far from saying that this Act of Parliament, like many other Acts of Parliament, cannot be abused, but on the whole I am not greatly impressed with the danger in question, because I think that it is, in the great majority of possible cases, avoided by the provisions of s. 4 of the Act. The result of such a case as has been suggested to me would or might be in most cases, that the persons who had become entitled to the freehold reversion would apply to the Commissioners, and in such a case the Commissioners might well exercise their rights and order the premises to be sold: and then, by virtue of cl. 3 of the Schedule, the persons entitled to the freehold reversion or their successors would have a right of pre-emption. In other words, I think that anyone who attempted to use this Act in the way suggested would probably find his nefarious designs likely to be defeated.

However that may be, I have to construe the Act as I apprehend that it ought to be construed, and the first question that arises is whether, upon the true construction of the deed, I am justified in saying that the premises comprised in the lease are held upon trust to be used for the purposes of a place of public religious worship. That is, of course, a question of construction, but I am entitled to be informed as to the practice and doctrines of the Salvation Army, inasmuch as the phrase in the deed incorporates that practice and those doctrines in the phrase "as and for the purpose of a place of worship by and in accordance with the practice and doctrines of the Salvation Army." Evidence has been given by experienced officers of the Salvation Army to inform me as to those doctrines and that practice. It is sufficient to say that I am perfectly satisfied that the Salvation Army Hall is used for the purpose of holding, among other things, religious services which are open to all, and that it has never been the practice of the Salvation Army

to possess or own places of worship which are not places of public worship in the sense that the public are not admitted. It is true, as will appear in one moment, that sometimes there are buildings used for the purposes of children, but to my mind a place is none the less a place of public worship because the public who are invited to that place are a particular section of the public, such as either children or men or women. That seems to me to be clear as a matter of common sense. It has been rightly said that "public" is a word of very elastic meaning, and I cannot conceive that within the true meaning of the definition as contained in this Act worship is any the less public worship because on a particular occasion a section only of the public is invited to attend. In my opinion, therefore, the trusts of the deed are trusts for the purposes of a building to be used for public religious worship, and that is the main object of the deed. It is true that there are included in the lease two separate and distinct premises: one of them is known as the Salvation Army Hall, or as the Citadel of the Salvation Army in Weston-super-Mare; the other of them, which is separated by a yard, is described in the deeds as Carlton House. It has, however, upon it in large letters the inscription "Young People's Hall," and I am told that that is the general name by which it is known. The Salvation Army Hall, as its name implies, contains nothing more than a large meeting-place, with a number of benches and a raised platform at the end of the hall, which is just what one would expect a Salvation Army Hall to contain; and I do not think that it is suggested that in relation to the Hall there are any premises that are used otherwise than for the purposes of the Salvation Army in the sense of religious purposes in the ordinary meaning of the words. But with regard to the adjoining building, Carlton House, or the Young People's Hall, there are a number of rooms upstairs which are not *prima facie* rooms used for the purposes of hymns or religious services or addresses, but are used for the purposes of instruction. A good deal of reliance has been placed upon that, but it is to be remembered that

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MAUGHAM in the Act the expression "place of worship" includes a
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 1931 and held upon the same trusts as a place of worship." I
 STRADLING should therefore imagine that these rooms, so far as they are
 v. used for the purposes of anything in the nature of a Sunday
 HIGGINS. School, are clearly within the definition. I wish to add this,
 — that I do not consider in a case of this sort that the premises
 are the less held upon trust for the purposes of a place of
 worship because there are included in the premises certain
 rooms which may be used for secular objects. I do not suppose
 that any living human being would doubt that St. Paul's
 Cathedral was a place used for the purposes of a place of public
 worship, but those who know it know that it includes, amongst
 a number of other rooms to which the public are not generally
 admitted, an excellent and interesting library in which prayers
 do not take place, and I doubt whether there is any big
 cathedral in England of which the same might not be said.
 There might also be rooms for caretakers. In the old days
 in connection with many churches there was a priest's room,
 and I could suggest other rooms to which visitors to buildings
 of this kind are often admitted which are not used for
 the purposes of public worship. It occurs to me to mention
 as examples chapter-houses, places where vestments are kept,
 and places where books are kept. In other words, to put it
 in another way, I have come to the conclusion that premises
 are held upon trust to be used for the purposes of public
 religious worship none the less because some of the minor or
 less important parts of those premises are not used for public
 worship.

The next question to be considered is whether the premises
 are being used for those purposes at the present time. That
 is the other condition contained in s. 1 of the Act, and as to
 that I think that it cannot be disputed, having regard to the
 evidence, that the whole of the premises are being so used,
 with the exception, perhaps, of the upstairs rooms, or some
 of the upstairs rooms, in Carlton House. With regard to those
 I have already expressed my opinion. Accordingly, I think
 the provisions of s. 1 are complied with.

The action must fail, and must be dismissed, with the MAUGHAM usual consequences.

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Solicitors : *Rider, Heaton, Meredith & Mills, for Baker & Co., Weston-super-Mare ; Ranger, Burton & Frost.*

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Distinguished. *In re* STRAKOSCH,
DECD. TEMPERLEY v. ATTORNEY-
GENERAL - [1948] 1 Ch. 37
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Explained and distinguished. Re
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Explained. Re STRA-
KOSCH, DECD.
[1949] 1 Ch. 529

[1931. S. 714.]

*Charity—Bequest of Residue “unto my country England.”—Validity—
Transfer of Residue to Person appointed by Crown under Sign Manual—
Form of Order.*

A testator, who died in 1930, by his will gave his residuary estate
“unto my country England for—own use and benefit absolutely” :—

Held, that residuary gift was a valid gift for charitable purposes and
that the residuary estate must be transferred to such person as His
Majesty should direct under his sign manual.

Nightingale v. Goulburn (1847) 5 Hare, 484; (1848) 2 Ph. 594 followed.

Dicta of Younger L.J. in *In re Tetley* [1923] 1 Ch. 258, 275, and of
Lord Cave in the same case sub nom. *Attorney-General v. National
Provincial and Union Bank* [1924] A. C. 262, 264, 265, explained.

Decision of Bennett J. [1931] 2 Ch. 364 reversed.

APPEALS from a decision of Bennett J. (1)

The testator, Theodore Wynford Smith, by his will dated
January 13, 1917, appointed the Public Trustee to be the
sole executor thereof and, after directing that his debts and
funeral expenses should be paid by his executor, provided as
follows : “ I give devise and bequeath all my estate and effects
whatsoever and wheresoever both real and personal whether
in possession or reversion remainder or expectancy unto my
country England to and for—own use and benefit absolutely.”

The testator died on April 23, 1930, and his will was proved
on August 6, 1930.

A summons was taken out by the Public Trustee for the
determination of the question whether the residuary gift

(1) [1931] 2 Ch. 364.

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“unto my country England” (a) constituted a valid charitable gift, or (b) operated in favour of His Majesty’s Treasury, or (c) was void.

Bennett J. held (following *In re Tetley* (1)), that the gift was not a gift which must necessarily be confined to charitable purposes, and it was therefore void. He also held that, in using the phrase “unto my country England,” the testator could not be clearly regarded as having intended that the bequest should operate in favour of His Majesty’s Treasury; and that the residue was consequently undisposed of and devolved as on an intestacy.

From this decision there were two appeals, by the Attorney-General and the Solicitor-General respectively.

The appeals were heard on October 26, 27, 28, 1931.

Stafford Crossman for the Attorney-General. The question in this case is whether a testator can by his will make a valid charitable bequest to the nation. The gift here is “unto my country England.” That it is submitted is a good charitable gift, and as there is no interposition of trustees it should be administered by the Crown under the sign manual for charitable purposes. The case is substantially the same as *Nightingale v. Goulburn* (2), where a bequest “to the Queen’s Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain,” was held to be a valid charitable bequest. It is well settled that a charitable gift will not fail for want of a trustee. On construction it is submitted that the gift in the present case is a gift in aid of the National Exchequer, and can only be applied in relief of the taxes. If that is so, the gift comes within the words “other taxes” in the preamble to the Statute of Elizabeth.

[LORD HANWORTH M.R. referred to *Commissioners for Special Purposes of Income Tax v. Pemsel*. (3)]

The natural construction of the gift is that it is a gift to the inhabitants of England. If it be admitted that it is a

(1) [1923] 1 Ch. 258; in H. L. sub nom. *Attorney-General v. National Provincial and Union Bank* [1924] A. C. 262.
(2) 5 Hare, 484; 2 Ph. 594.
(3) [1891] A. C. 531.

gift to the community effect can be given to it only by applying it in relief of the taxes of the country.

Gifts to a parish, a county, or a city have been held to be good charitable gifts: *West v. Knight* (1); *Attorney-General v. Lord Lonsdale* (2); *Mitford v. Reynolds* (3); *Attorney-General v. Webster* (4); *Goodman v. Mayor of Saltash* (5); *In re Christchurch Inclosure Act*. (6)

If a gift for the benefit of the inhabitants of a town, or of a city, or of a county is charitable, it is difficult to see why a gift to a country should not also be charitable, and the above cases are, it is submitted, authorities that such a gift is charitable.

In *Newland v. Attorney-General* (7), where there was a bequest of stock "to His Majesty's Government in exoneration of the national debt," the Lord Chancellor directed it to be transferred to such person as the King, under his sign manual, should appoint.

In determining whether a gift is charitable, regard cannot be had to the position held by the trustee. Thus a gift to the vicar of a parish for "parochial institutions or purposes" was held to be invalid: *In re Stratton*. (8)

Bennett J. was influenced in his decision in this case by certain dicta of Younger L.J. in *In re Tetley* (9) in the Court of Appeal, and of Lord Cave in the same case in the House of Lords, sub nom.: *Attorney-General v. National Provincial and Union Bank* (10), but those dicta cannot be taken as overruling the long line of previous decisions. It is submitted, therefore, that Bennett J. decided the present case on those dicta in *Tetley's* case (9) and overlooked the decision in *Nightingale v. Goulburn*. (11)

A. Andrewes-Uthwatt for the Solicitor-General. I adopt the argument put forward on behalf of the Attorney-General that the gift is a valid charitable bequest.

(1) (1669) 1 Ch. Cas. 134.

(2) (1827) 1 Sim. 105.

(3) (1842) 1 Ph. 185.

(4) (1875) L. R. 20 Eq. 483.

(5) (1882) 7 App. Cas. 633.

(6) (1888) 38 Ch. D. 520.

(7) (1809) 3 Mer. 684.

(8) [1931] 1 Ch. 197.

(9) [1923] 1 Ch. 258, 274.

(10) [1924] A. C. 262.

(11) 5 Hare, 484; 2 Ph. 594.

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Having regard to the constitution of this country it is submitted that the Crown is the proper person to take this gift.

Wherever you find an act of national activity it is carried out in the name of the Crown. The gift here is to His Majesty, not as a personal gift, but in right of his Crown.

[He referred to the Civil List Act, 1837 (1 & 2 Vict. c. 2), s. 2.]

Wilfrid Hunt for next of kin. The decision of Bennett J. was right. The gift in question is equivalent to a gift "for the benefit of my country England," and is void for uncertainty. A gift for certain specific purposes in a locality may be good, but not all purposes for the benefit of a country are necessarily charitable. The first question therefore to be decided is whether the gift here is charitable. In *In re Tetley* (1) Warrington L.J. said with regard to a gift for "patriotic" purposes: "the real question is whether the word 'patriotic' has such a limited meaning that it excludes every object or purpose which is not 'charitable' within the legal definition of that term. If it does not do so, but includes objects which are not charitable within the legal definition, then the gift for patriotic objects and purposes would not be a good gift, but would be void for uncertainty." So here the gift "to my country England" might include purposes which were not charitable.

[LORD HANWORTH M.R. We have to bear in mind what was said in *Nightingale v. Goulburn* (2) and by Lord Selborne in *Goodman v. Mayor of Saltash*. (3)]

Nightingale v. Goulburn (2) is inconsistent with a number of cases which have been decided by the House of Lords in recent years.

In *Inland Revenue Commissioners v. Yorkshire Agricultural Society* (4) Lawrence L.J., referring to the fourth class of Lord Macnaghten's well known classification of legal charities in *Pemsel's* case (5) said that he must not be

(1) [1923] 1 Ch. 258, 270.

(3) 7 App. Cas. 633, 642.

(2) 5 Hare, 484; 2 Ph. 594.

(4) [1928] 1 K. B. 611, 636.

(5) [1891] A. C. 531.

understood as asserting that every purpose of public general utility was necessarily charitable in the legal sense.

A gift for the general purposes of a community is void for uncertainty.

[LAWRENCE L.J. I cannot see the distinction between a limitation to a parish and a limitation to a country.]

A bequest for public purposes to be selected by a third party, though limited to a particular locality, is void for uncertainty: *Houston v. Burns*. (1)

A trust which is not charitable cannot be converted into a charity by limiting the area in which it is to operate, though such limitation may prevent a charitable trust from being avoided for vagueness and uncertainty: *In re Gwyon*. (2) See also *In re Davidson* (3); *In re Friends' Free School*. (4)

[LORD HANWORTH M.R. Do you say that a gift to the inhabitants of a particular district is bad?]

Yes.

H. F. F. Greenland for other next of kin adopted the same argument.

J. H. Stamp for the Public Trustee.

Stafford Crossman in reply. In *Houston v. Burns* (1) the testatrix had directed her trustees to apply the residue of her estate "for such public, benevolent or charitable purposes" in connection with a particular parish as they should think proper. There was therefore no gift until the trustees had selected the objects.

[LORD HANWORTH M.R. referred to *Blair v. Duncan*. (5)]

That was really a similar case to *Houston v. Burns*. (1)

Cur. adv. vult.

Oct. 28. LORD HANWORTH M.R. On January 13, 1917, Theodore Wynford Smith, of 5 Palace Gardens Mansions, Notting Hill Gate, and Newton Abbot, in South Devon, made his will. On April 23, 1930, he died, and his will was duly proved on August 16, 1930. The will is quite short. He

(1) [1918] A. C. 337.

(2) [1930] 1 Ch. 255.

(3) [1909] 1 Ch. 567.

(4) [1909] 2 Ch. 675.

(5) [1902] A. C. 37.

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directed the payment of his funeral and testamentary expenses and all his just debts, and then he bequeathed "all my estate and effects whatsoever and wheresoever both real and personal whether in possession or reversion remainder or expectancy unto my country England to and for—own use and benefit absolutely," and he appointed the Public Trustee to be his executor. We are told that the will was made upon a printed form, and that this accounts for the grammar leaving something to be desired, though the sense is not difficult to gather.

We have to construe the will, and it is said that that bequest "unto my country England for—own use and benefit absolutely" is so vague as to be void for uncertainty, and that it cannot be held to be a charitable bequest so as to take it out of the rule against perpetuities, and therefore the will is ineffective. It is noticeable that it is an out-and-out gift without any conditions at all, "unto my country England for—own use and benefit absolutely." The Court leans in favour of making the testamentary dispositions of a testator effective if possible within the limitations and in accordance with the principles of law. First of all, on the construction to be placed upon the will there appears to be an entity indicated—namely, England. But is that so vague that it contains no meaning at all? I cannot so interpret the bequest. I think there is an entity, although it would be possible to raise, I will not say doubts, but a criticism that England itself is now joined to Scotland and to Wales and Northern Ireland, and that one uses a different and more comprehensive term when one is speaking of that collocation of countries. At the same time, the word "England" does connote to many an entity, and I think if a man was asked where he was born he would be content to say, "I was born in England," without any more specific identification.

I then come to the question: Is a bequest to a country, here England, good? Two questions are somewhat mixed up. One has to consider, at the same time, whether it is good as not being uncertain, and whether it is a charitable gift so as to eliminate any danger from the other rules of law.

As far back as *West v. Knight* (1), which was decided in 1669, it was decided that a gift by a testator to the parish of Great Creaton, where he was born, without saying to what use, was good. There were no specific indications of the purposes for which it should be used, and all that was indicated was the parish where the testator was born. It was held that it was good, and that the matter was to be referred to the Master in order to see that the money was disposed of for the benefit of the poor of the parish. That ultimate destination is a matter with which I will deal later on, but the noticeable fact is that a gift to the parish without any specific use was held to be good as a gift to that area, or, rather, of course, for the benefit of those who lived within that area.

Then *Attorney-General v. Lord Lonsdale* (2) is a noticeable case. There had been there a deed and a will whereby a certain sum was to be used for charity, and the particular charity that was then indicated was a school. In due course the school was established and carried on for some forty years. At the end of that time the school came to an end and the tenant for life who was in enjoyment of the estated used the money, which was coming in and had been devoted to the school, for his own purposes. The Attorney-General then brought proceedings, claiming that the money ought to be restored to a charitable purpose. The alternative to the school was this, "or otherwise upon such other trusts, and for such other purposes as my executors shall think most conducing to the good of the county of Westmorland, and, especially of the parish of Lowther." The observation that is made there by Sir John Leach V.-C. is (3): "This amounts to a clear direction that, if, for any reason, the testator's intention as to the school should fail, the manor, lands and rectory intended for the endowment of the school, should be applied to other charitable purposes: and the Court is bound to carry this intention into effect." I say the case is a noticeable one because it was argued with cogency that, inasmuch as the specific bequest

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(1) 1 Ch. Cas. 134.

(2) 1 Sim. 105.

(3) 1 Sim. 110.

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to the school had come to an end or failed, the indefinite purpose ought not to be brought out of obscurity and given effect to; but it was held by the Vice-Chancellor that the second bequest upon the failure of the first was effective and good, and he clearly indicated that the bequest was valid because the money was to be applied to charitable purposes, although it was given simpliciter for the good of the county of Westmorland, and especially of the parish of Lowther, without any more specific indication as to the mode of its application.

Then in *Attorney-General v. Mayor, &c., of Carlisle* (1) a grant from the Crown of certain privileges and property for the defence of and preservation of the peace within the City of Carlisle was held to be a charitable gift. That again was vague in its ultimate terms, but the persons who were to benefit were the particular city—namely, Carlisle.

In *Mitford v. Reynolds* (2) the testator gave the remainder of his property to the Government of Bengal, to be applied “to charitable, beneficial, and public works, at and in the city of Dacca in Bengal, the intent of such bequest and direction being that the amount shall be applied exclusively for the benefit of the native inhabitants in the manner they and the Government may regard to be most conducive to that end.” It was held that that was good. Lord Lyndhurst L.C. said (3): “If these words . . . are to be taken distributively and not conjunctively, and any one of the purposes or of the alternatives would not constitute a valid charitable bequest, the whole disposition will, of course, fail.” But it was held there that they were to be taken conjunctively, with the result that the bequest was held to be good. He said (4): “Now it is argued that this is a void bequest; and that this being a void bequest, and the amount which it will be necessary to expend for the purpose of carrying this design into effect, if it could be legally carried into effect, being uncertain, and this being to be paid out of the residue, and the remainder of the residue being to be applied to the charitable objects

(1) (1828) 2 Sim. 437.

(3) 1 Ph. 190.

(2) 1 Ph. 185.

(4) Ibid. 195.

to which I have already adverted, that if the sum to be applied to this object is uncertain, the balance also must be made uncertain," and, therefore, that the whole bequest was void for uncertainty. But he held otherwise, and that the bequest to the Government of Bengal for the purposes of the natives of Dacca was good; another illustration in line with the other cases, where a gift to the inhabitants of an area larger than a parish or a county or a city is also held to be good.

Then comes *Nightingale v. Goulburn* (1), where there was a bequest "to the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of Great Britain." That bequest was held to be valid so far as related to the personalty. The question there discussed was whether the bequest given to the benefit and advantage of Great Britain was so wide and vague as to be void. Wigram V.-C., in his judgment, drew attention to the well-known case of *Morice v. Bishop of Durham* (2), and he said (3): "I do not understand the observations of Sir W. Grant, in *Morice v. The Bishop of Durham* (2), as deciding that no general words could be equivalent to the word 'charity'; nor do I think it would be right, with reference to the decided cases, to lay down any such general rule." Then he founded himself upon *West v. Knight* (4); *Jones v. Williams* (5); *Attorney-General v. Mayor, &c., of Carlisle* (6); *Attorney-General v. Lord Lonsdale* (7); and *Mitford v. Reynolds*. (8) As to the word "charitable" he said that the bequest in *Mitford v. Reynolds* (8) was for the benefit of all the native inhabitants of Dacca in general, both rich and poor, and that it was held good. He added that in the case with which he had to deal, the British public would stand in the situation of the person indicated by a bequest to a trustee for the advantage of A. B. That case went before Cottenham L.C. on appeal, and after a discussion the Lord Chancellor said (9): "Many bequests

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(1) 5 Hare, 484.

(2) (1804) 9 Ves. 399, 406.

(3) 5 Hare, 484, 487.

(4) 1 Ch. Cas. 134.

(5) (1767) 1 Amb. 651.

(6) 2 Sim. 437.

(7) 1 Sim. 105.

(8) 1 Ph. 185.

(9) 2 Ph. 594, 595.

C. A. have been held good charitable gifts to parishes, towns, counties, and provinces," and he cites the cases to which I have already referred. "Why then is the present gift not good? Why is this kind of charitable gift to be held void because the particular objects are not specified, when that objection does not prevail in what have been called proper charities? It is no criterion of the invalidity of a charity bequest, that it is not capable of being administered in this Court, for that is the case in every charitable gift which is administered under the sign manual." Again he referred to *Morice v. Bishop of Durham* (1) and said (2): "If a gift to the Government for the benefit of the public be good, can it become bad because it is given to one member of that Government for the same purpose?" He pointed out that in that case the Chancellor of the Exchequer did not take for his own benefit, but a discretion would have to be exercised as to how the gift was used. After the bequest has been held good there may be some question arising as to how it can be best used for the benefit of the parish, the town, the county or the province. But what we have, first of all, to determine is whether this is a good bequest to what is really a defined class, that class being, in some cases to which I have referred, found in the parish or sometimes in the city, sometimes in the province and sometimes in a still larger area, but none the less defined.

Now those cases have all been considered from time to time and held good. In *Goodman v. Mayor of Saltash* (3) Lord Selborne, a master of accurate diction, says (4): "A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust: and no charitable trust can be void on the ground of perpetuity," and he cites some of the cases to which I have already referred. Lord Cairns says (5): "It appears to me that there is no difficulty in supposing such a grant, a

(1) 9 Ves. 399, 406.

(3) 7 App. Cas. 633.

(2) 2 Ph. 596.

(4) Ibid. 642.

(5) 7 App. Cas. 650.

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grant to the corporation before the time of legal memory of a several fishery, a grant by the Crown, with a condition in that grant that the free inhabitants of ancient tenements in the borough should enjoy this right, which as a matter of fact the case tells us they have enjoyed from time immemorial. A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities." It is quite impossible, certainly in this Court, to set aside the weighty opinions of two such distinguished lawyers and Lord Chancellors. There seems to be abundant and clear approval of the cases to which I have already referred. But the matter does not stop there, for the same approval is again given by Lindley L.J. in *In re Christchurch Inclosure Act*. (1)

Lastly, in *Commissioners for Special Purposes of Income Tax v. Pemsel* (2), Lord Halsbury L.C. says: "A gift 'to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain' is a 'charitable purpose.'" I will not stop to note that the gift being to the Chancellor of the Exchequer does not seem to have been the root of the decision in *Nightingale v. Goulburn* (3), and recent authorities would seem to indicate that one ought not to draw any particular deduction from the person who is made

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(1) 38 Ch. D. 520.

(2) [1891] A. C. 581, 544.

(3) 2 Ph. 594.

C. A. trustee. But put in the way in which it is by Lord Halsbury,
 1931 "appropriated to the benefit and advantage of my beloved
 SMITH, country," it is a good charitable bequest.
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 PUBLIC Now I want to turn back for a moment to *Morice v. Bishop*
 TRUSTEE of *Durham* (1), for that is the basis on which the judgment of
 v. Lord Macnaghten in *Pemsel's* case (2) is founded. What was
 SMITH. decided there was that a bequest "for such objects of
 Lord Hanworth benevolence and liberality as the trustee in his own discretion
 M.R. shall most approve," cannot be supported as a charitable
 legacy. They were objects of benevolence and liberality.
 Those words are certainly too wide within the decision
 in *Pemsel's* case (2), and were held within the decision in
Morice v. Bishop of Durham (3) to be too wide. They
 would be too indefinite. That was the ground on which
 the trust failed. But Lord Eldon, when the latter case
 came before him (1), made this observation (4): "With
 reference to those, in which the Court takes upon itself to say,
 it is a disposition to charity, where in some the mode is left
 to individuals, in others individuals cannot select either the
 mode, or the objects, but it falls upon the King, as *parens*
patriae, to apply the property, it is enough at this day to say,
 the Court by long habitual construction of those general
 words has fixed the sense; and, where there is a gift to
 charity, in general, whether it is to be executed by individuals,
 selected by the testator himself, or the King, as *parens*
patriae, is to execute it (and I allude to the case in *Levinz* (5)),
 it is the duty of such trustees, on the one hand, and of the
 Crown, upon the other, to apply the money to charity, in the
 sense, which the determinations have affixed to that word
 in this Court: viz., either such charitable purposes as are
 expressed in the Statute (6), or to purposes having analogy
 to those." That passage, to my mind, is of importance,
 because it clearly shows that a gift to charity in general
 terms may be good, although it would fall to those who have

(1) (1805) 10 Ves. 522.

(4) 10 Ves. 522, 540.

(2) [1891] A. C. 531.

(5) *Att.-Gen. v. Matthews* (1676)

(3) 9 Ves. 399.

2 Lev. 167.

(6) 13 Eliz. c. 4.

the responsibility of executing it to see that it is confined to objects which are charitable within the proper sense of that word as construed in these Courts, and that you may have a general bequest in which that duty falls upon the King as *parens patriae* to administer it. But he does not say that a bequest general in its terms is to be held void by the Court because of those general terms; he seems to indicate, in close alliance with the authorities I have already cited, that you may have a gift to charity in general, afterwards to be devoted to purposes chosen by, it may be, the King, or it may be other persons. In *Newland v. Attorney-General* (1) we have an illustration of that, because in the will of Abraham Newland, there was a bequest of stock "to His Majesty's Government in exoneration of the National Debt." There the Lord Chancellor directed the stock to be transferred to such person as the King under his sign-manual should appoint—an indication of carrying out the method suggested by Lord Eldon in *Morice v. Bishop of Durham*. (2)

We have therefore over a long series of years a sequence of authority which must be respected, and, of course, followed, in this Court. But it is said that there are in recent years other cases which militate against that view. Before I pass to those, I desire to call attention to the fact that this class of cases to which I am now coming had a different problem to solve, such as is to be found in *In re Macduff*. (3) From time to time you find cases in which you have, as in *In re Macduff* (4), a bequest of money to some one or more purposes, charitable or philanthropic, and it is held that they must be treated as alternative purposes, and that such a bequest is not good, because the alternative was given to those who had to determine how the bequest should be devoted to philanthropic purposes; and there are many philanthropic purposes which cannot be held to be charitable within the well-known definition of Lord Macnaghten in *Pemsel's case*. (5) In *In re Macduff* (4) Lindley L.J. deals with that case, and in

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(1) 3 Mer. 684.

(3) [1896] 2 Ch. 451.

(2) 10 Ves. 522.

(4) [1896] 2 Ch. 451, 467.

(5) [1891] A. C. 531, 583.

C. A. discussing the words of Lord Macnaghten he says that they
 1931 are a paraphrase of the words of Sir Samuel Romilly :
 SMITH, “ ‘ Charity ’ in its legal sense comprises four principal
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 PUBLIC advancement of education ; trusts for the advancement of
 TRUSTEE religion ; and trusts for other purposes beneficial to the
 v. community, not falling under any of the preceding heads,
 SMITH. leaving out those somewhat significant words of Sir Samuel
 Lord Hanworth Romilly as to the fourth head, ‘ which is the most difficult,’
 M.R. which shewed perfectly plainly that Sir Samuel Romilly saw,
 and I do not doubt that Lord Macnaghten saw also, that there
 might be some purposes of public general utility which might
 be charitable and some which might not.” That was a case
 in which an alternative mode of dealing with the bequest
 was provided in the terms of the bequest itself. Such an
 alternative was also to be found in *Blair v. Duncan*. (1) There
 Lord Davey deals with the cases in this way : “ There are
 three cases in this House to which your Lordships’ attention
 was called. In *Hill v. Burns* (2) a bequest to trustees was
 held valid, whereby a testatrix appointed the residue of her
 estate to be applied by her trustees in aid of ‘ the institutions
 for charitable and benevolent purposes established or to be
 established in the city of Glasgow, or neighbourhood thereof,’
 to be appropriated in such manner as to the trustees might
 seem proper. In *Crichton v. Grierson* (3) a gift to trustees
 of a residue to be applied in such charitable purposes and
 bequests to such of the testator’s friends and relations as
 might be pointed out by his wife, with the approbation of the
 majority of the trustees, was also held valid. Lastly, in
Miller v. Black Trustees (4) a bequest for such charitable and
 benevolent purposes as the trustees might think proper was
 held valid. If, therefore, the words in the present case were
 merely ‘ charitable purposes,’ or were ‘ charitable and public
 purposes,’ I think effect might be given to them, the words
 in the latter case being construed to mean charitable purposes
 of a public character.” In other words, where you can treat

(1) [1902] A. C. 37, 43.

(3) (1828) 3 W. & S. 329.

(2) (1826) 2 W. & S. 80.

(4) (1837) 2 S. & M’L. 866.

the words conjunctively they may be overshadowed by the word "charitable," but where you get an alternative proposed, as in *In re Macduff* (1), or in *Blair v. Duncan* (2), "for charitable or public purposes," using the words disjunctively, that shadow cannot be brought forward from the word "charitable" so as to prevent a distribution of the money for some objects which are not charitable. That is the class of cases in which a difficulty arises because of the more specific words which are used.

One of the cases which are relied upon by the respondents to this appeal is *Houston v. Burns*. (3) In that case there was a bequest to public purposes to be selected by a third party though limited to a particular locality; the words in that case were "for such public, benevolent, or charitable purposes" in connection with a particular parish. It will be observed that the words are disjunctive and they fall definitely within the prohibition, I was going to say, or, at least, within the difficulty, pointed out by Lord Davey in *Blair v. Duncan*. (2) It is impossible to treat such words as united together under the word "charitable." So it was held that the words were too wide and the mere local limitation did not cure the ambiguity of the wide words: you could bestow the moneys on purposes not charitable even though that was to be done within a particular area. I do not find that any of those cases militate against the principle adopted by the cases to which I have already referred.

Then I come, lastly, to the case which was relied upon by the learned judge, *In re Tetley*. (4) That was a case in which the testator directed his trustees to apply a fifth of his residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire as my trustees may in their absolute discretion select in such shares and proportions as they shall think proper." It was held that the

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(1) [1896] 2 Ch. 451, 467.

(2) [1902] A. C. 37, 43.

(3) [1918] A. C. 337.

(4) [1923] 1 Ch. 258; in H. L. sub

nom. *Attorney-General v. National
Provincial and Union Bank* [1924]
A. C. 262.

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phrase "patriotic purposes or objects" was again disjunctive and too wide. Russell J. says (1): "The Attorney-General contended before me that the clause should be read conjunctively, and that so read the trustees in selecting any purpose, object or institution were confined to selecting such as were both patriotic and charitable, or at all events that every object selected by them must be charitable. I am unable so to read the gift. The repetition of the word 'such' and the reference both to patriotic objects and to charitable objects makes such a reading in my opinion impossible. The testator has by this clause, according to its natural and grammatical interpretation, given to the trustees a fourfold choice in the exercise of which he authorizes them to devote the funds to any one or more of the following—namely, 'patriotic purposes,' 'patriotic objects,' 'charitable institutions,' and 'charitable objects.'" Lord Sterndale says he agrees with those words of Russell J. Warrington L.J. does the same, and we have the key of the case in those words used by Russell J.; in other words, *Tetley's* case (2) falls exactly into line with *Blair v. Duncan* (3) and *Houston v. Burns*. (4) But reference is made to some words which were used (and this was what created the difficulty in the mind of the learned judge below) by Lord Cave in his speech, where he says (5): "Now the general rule is clear that if you are making a will you must declare your wishes, and not leave it in wide and uncertain terms to some one else to make a will for you." Again he says (6): "So here it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare; you must also show it to be a charitable trust. My Lords, I am not able to say that this is a charitable trust. The expression 'patriotic purposes' is vague and uncertain." I have read those words very carefully. I think they are intended to be directed to the cases where there is an alternative, where you cannot make

(1) [1923] 1 Ch. 261.

(2) [1923] 1 Ch. 258.

(3) [1902] A. C. 37.

(4) [1918] A. C. 337.

(5) [1924] A. C. 262, 264.

(6) *Ibid.* 265.

the word "charitable" conjunctively limit the other purposes: they are intended to indicate that where an alternative is given it cannot be shown that it is necessarily for a charitable trust. I cannot find that those words are intended to overrule the principle of the sequence of cases from *West v. Knight* (1) right away down to *Nightingale's* case (2) and the approval expressed of them, to which I have already referred. I think one must interpret those words in reference to the case upon which they were spoken, and not otherwise: they were simple words to which full effect can be given if one reads them as intending the same result as Lord Davey's words in *Blair v. Duncan*. (3)

The result is that I come to the conclusion that there is a definitive purpose—namely, that the bequest is to be for England. That is good in the same sense that, although general, when the sum bequeathed comes to be used it is to be applied to charitable purposes, as in *Attorney-General v. Webster*. (4) There is no area or purpose of distribution suggested which is not charitable. Why not then give effect to the plain meaning that it is for the advantage, within the meaning of the rule as to the interpretation of the word "charitable," of the inhabitants of England?

In my opinion, therefore, the Attorney-General succeeds upon his appeal. Under these circumstances the right course is to hand this money over to the person designated under the sign manual by the supreme head of the country for the advantage of the country, England. That supreme head, as Lord Eldon said, being the *parens patriae*, will cause it to be distributed in accordance with the law applicable to charitable moneys. It appears to me that *In re Tetley* (5) does not authorize us, still less compels us, to overrule the long series of cases which have been approved in the House of Lords; and I have come to the conclusion, therefore, that we are free from the difficulty which oppressed the learned judge below, and we must give effect to this bequest as one which is good as a charitable bequest.

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(1) 1 Ch. Cas. 134.

(2) 5 Hare, 484; 2 Ph. 594.

(3) [1902] A. C. 37, 43.

(4) L. R. 20 Eq. 483.

(5) [1923] 1 Ch. 258; [1924] A. C.
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LAWRENCE L.J. In my judgment this case is covered by the decision in *Nightingale v. Goulburn* (1), where the Court had to consider the validity of a residuary bequest to the Queen's Chancellor of the Exchequer to be appropriated by him for the benefit of Great Britain. In the Court below *Wigram V.-C.*, after reviewing the earlier authorities, states (2) : "This is not simply a bequest to trustees for purposes of a general and wholly unrestricted nature, but for the benefit and advantage, that is, for the good of a particular class,—a large class, it is true, but still a class coming within some defined limits, and which is within the decision in *Mitford v. Reynolds*. (3) If a bequest were made to a trustee to be appropriated, at his discretion, for the benefit and advantage of A. B., that would in equity be a bequest to A. B. The British public, in this case, stand in the situation of A. B. in the case I have supposed ; but it has not been argued that that difference alone was fatal to the bequest." The learned Vice-Chancellor then proceeds to consider whether the fact that the Chancellor of the Exchequer was the person appointed to administer the trust militated against the view that he had formed that the bequest was valid, and concludes that it does not. His words are (2) : "I am of opinion that this bequest is valid, unless it can be shewn that the Chancellor of the Exchequer may, consistently with the trust under the will, appropriate the fund to purposes in which the British public have no direct and immediate interest,—no interest except incidentally and indirectly,—or that he is at liberty in fact to appropriate it to any other than such general public purposes as the Attorney-General might protect and control. I cannot conceive a purpose to which these trust funds could be lawfully applied, according to the will, which would not be so general and public in its character as to constitute a charitable use." In the Court of Appeal (4) Lord Cottenham affirmed the decision of *Wigram V.-C.* on the same grounds as those upon which the learned Vice-Chancellor had founded his judgment, and also was of opinion that the fact of the Chancellor of the

(1) 5 Hare, 484 ; 2 Ph. 594.

(3) 1 Ph. 185.

(2) 5 Hare, 484, 491.

(4) 2 Ph. 594.

Exchequer having been appointed as trustee did not operate to invalidate the gift; but he added that it might have a bearing on the question as to the manner in which the bequest should be applied. The judgments, both of Wigram V.-C. and of Lord Cottenham, were expressly based upon the earlier cases in which bequests to parishes, towns, counties and provinces had been held good charitable bequests, and particularly upon the decisions in *West v. Knight* (1); *Attorney-General v. Lord Lonsdale* (2); and *Mitford v. Reynolds* (3), none of which in any way depended upon the particular office occupied by the person selected by the testator as his trustee. To this line of cases can now be added *Goodman v. Mayor of Saltash*. (4) The effect of the decision in *Nightingale v. Goulburn* (5) is that a bequest to a trustee for the benefit of Great Britain is not simply a bequest to the trustee for public purposes generally, which would be void for uncertainty, but is a bequest for the benefit of a particular class, albeit a large class, coming within some definite limits and is, therefore, a bequest for a specified public purpose and, as such, a valid charitable bequest. The decision in *Nightingale v. Goulburn* (5), so far as I know, has never been questioned, and in *Pemsel's* case (6) Lord Halsbury refers to it without suggesting any doubt as to its correctness.

It follows, if my view of the effect of the decision in *Nightingale v. Goulburn* (5) is right, that a bequest "for the benefit of England," such as we have in the present case, is a fortiori a valid charitable bequest.

On behalf of the next of kin Mr. Hunt contended that the decision in *Nightingale v. Goulburn* (5) is inconsistent with a number of cases decided by the House of Lords in recent years, and that in view of those cases it could be supported, if at all, only on the ground that it was a gift to the Chancellor of the Exchequer and, therefore, in aid of taxation. In my judgment this contention, which succeeded in the Court below, is not well founded. The cases upon which Mr. Hunt

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(1) 1 Ch. Cas. 134.

(2) 1 Sim. 105.

(3) 1 Ph. 185.

(4) 7 App. Cas. 633.

(5) 5 Hare, 484; 2 Ph. 594.

(6) [1891] A. C. 531, 544.

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more particularly relied were *Blair v. Duncan* (1); *Houston v. Burns* (2); and *Attorney-General v. National Provincial and Union Bank* (3); all of which are, in my judgment, distinguishable from *Nightingale v. Goulburn* (4), and from the present case. The House of Lords, in those cases, had to consider bequests for public purposes generally under which, to quote Lord Davey's words in *Blair v. Duncan* (5): "It would, therefore, be in the power of the trustee to apply the whole of the fund for purposes which are not charitable, though they might be of a public character." Such trusts—that is to say, trusts for public purposes of a general and wholly unrestricted nature, as appears from the judgment of Wigram V.-C. in *Nightingale v. Goulburn* (6)—were at the date when that case was decided recognized to be void for uncertainty. It is interesting to note that in *Blair v. Duncan* (1) the learned counsel for the respondents relied upon *Mitford v. Reynolds* (7) and *Nightingale v. Goulburn* (4) as showing that a trust for public purposes generally would be invalid. It is to be observed that the House of Lords in the cases relied upon by Mr. Hunt did not cast any doubt on the line of cases of which *Nightingale v. Goulburn* (4) and the present case are examples, nor were any cases coming within that category even referred to in the speeches of the learned Law Lords. In *Tetley's* case (8), *Nightingale v. Goulburn* (4) was cited by the counsel for the Attorney-General. In the Court of Appeal Younger L.J. was the only member of the Court who referred to that case in his judgment. He said (9): "I cannot myself, however, escape from the impression that, whether consciously or not, the fact that the gift was in that case made to the holder of the office of Chancellor of the Exchequer for the time being led the Court to conclude that the way in which the public was necessarily to be benefited as a result of the gift made the gift unobjectionable." In the House of Lords *Nightingale v. Goulburn* (4) was not even cited. In view of

(1) [1902] A. C. 37.

(2) [1918] A. C. 337.

(3) [1924] A. C. 262.

(4) 5 Hare, 484; 2 Ph. 594.

(5) [1902] A. C. 37, 44.

(6) 5 Hare, 484.

(7) 1 Ph. 185.

(8) [1923] 1 Ch. 258.

(9) [1923] 1 Ch. 275.

the language of the judgments of both Wigram V.-C. and Lord Cottenham as reported, I cannot accept the view expressed by Younger L.J. in the passage which I have quoted from his judgment. It seems to me plain that both the Vice-Chancellor and the Lord Chancellor, so far from considering that the fact that the trusteeship was vested in the Chancellor of the Exchequer helped the contention that the trust was a valid charitable trust, were at pains to explain that in spite of that fact the bequest was a valid charitable bequest—the Vice-Chancellor on the ground that the Chancellor of the Exchequer would not under the trust be at liberty to appropriate the fund to any other than general public purposes under the control, if need be, of the Attorney-General; Lord Cottenham on the ground that it is no ground for the invalidity of a charitable bequest that it is not capable of being administered in this Court, for that is the case in every charitable gift which is administered under the sign manual. At the conclusion of his judgment Lord Cottenham expressly says (1): “I see no reason for doubting the propriety of the many similar cases which have been referred to, and if I did, thinking as I do that the present falls within the principle of them, I should be bound to follow them.”

The conclusion I have arrived at, after considering all the authorities to which our attention has been drawn, is that the present case falls within the principle of the cases in which the gift is for the benefit of a particular class and, therefore, for a specified public purpose, and not within the line of cases in which the gift is for public purposes of a general and wholly unrestricted nature.

In the result, therefore, I am of opinion that the bequest is a valid charitable bequest and that the appeal of the Attorney-General should be allowed.

ROMER L.J. The first thing to be done, in order to decide the questions arising on this appeal, is to ascertain the meaning of the words used by the testator, “my country

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England." It was at one time, I think, suggested, though perhaps not very strongly, on behalf of the Solicitor-General, that these words mean His Majesty the King. Such a construction would no doubt avoid much difficulty, but it is not one which, in my opinion, can be extracted from the words the testator has used. The words "my country England" must, I think, mean "my countrymen the people of England," or "my countrymen inhabiting England"; for, of course, it is obvious that they cannot mean that portion of the surface of the globe which is called England. It is equally obvious that we cannot construe the gift as a gift to the people of England—that is to say, a gift of residue which is to be divided equally between all the inhabitants of this country. We are, accordingly, as it seems to me, driven to treat the gift as a gift for the benefit of the testator's countrymen, the people of England. If that be a good charitable gift, no trustee having been appointed, I should myself have thought that the fund would have to be administered under the sign manual.

But, however that may be, the important question to be decided is whether it be a good charitable trust or not. In my opinion it is well established by authority that a gift for the benefit of the inhabitants of a particular place is a good charitable gift. The authority most in point in the present case is that of *Nightingale v. Goulburn* (1), where there was a gift "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, Great Britain." It was held by Lord Cottenham, affirming the decision of Wigram V.-C., that that was a good charitable gift. I am not going to read the judgment, I only wish to say this: like Lawrence L.J., I find myself unable to agree with Younger L.J., as he then was, when in giving his judgment in *In re Tetley* (2) he said that the foundation of that decision was the fact that the gift was to the Chancellor of the Exchequer. From the judgment of Lord Cottenham, it is, in my opinion, reasonably plain that the effect of it was

(1) 5 Hare, 484; 2 Ph. 594.

(2) [1923] 1 Ch. 258, 275.

this: that a gift for the benefit of the country Great Britain was a good charitable gift and that, that being so, it did not cease to be a good charitable gift because the gift was to Great Britain through the Chancellor of the Exchequer. Secondly, he held that, when at a later stage it became necessary to formulate a scheme for the administration of the charity, the fact that the gift was through the Chancellor of the Exchequer would serve as a useful guide to those whose duty it was to prepare the scheme. That case was merely a particular application of a still more general principle that has been established by cases decided both before and since *Nightingale v. Goulburn*. (1) It is sufficient to refer to *West v. Knight* (2), a gift for the benefit of a parish; to *Attorney-General v. Lord Lonsdale* (3), a trust for the benefit of a county; to *Mitford v. Reynolds* (4), a gift to the Government of Bengal for the benefit of native inhabitants; to *Attorney-General v. Webster* (5); to *Goodman v. Mayor of Saltash* (6), a decision of the House of Lords; to *In re Christchurch Inclosure Act* (7), a decision of this Court, where there was a trust for the benefit of the occupiers of certain cottages.

Now it has been said that those decisions have been affected and must no longer be treated as law by reason of certain dicta in this Court in *In re Tetley* (8) and in the House of Lords when that case went to that House, under the name of *Attorney-General v. National Provincial and Union Bank* (9), and to certain dicta in the House of Lords in *Houston v. Burns*. (10) But those dicta—and they not unnaturally affected the mind of Bennett J., and were indeed responsible for his decision in favour of the next of kin in this case—must be read in connection with the facts of the particular case in which they were uttered and with reference to the points that had to be decided in that case. When one looks at them it will,

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(1) 5 Hare, 484; 2 Ph. 594.

(2) 1 Ch. Cas. 134.

(3) 1 Sim. 105.

(4) 1 Ph. 185.

(5) L. R. 20 Eq. 483.

(6) 7 App. Cas. 633.

(7) 38 Ch. D. 520.

(8) [1923] 1 Ch. 258.

(9) [1924] A. C. 262.

(10) [1918] A. C. 337.

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I think, be found that what the authors of those dicta were concerned with was the proposition that every gift the purpose of which was the public benefit was necessarily a good charitable gift, and it was that proposition that the authors of the dicta in question were endeavouring to combat. It is impossible to think that any of the authors of those dicta intended, even if it was open to them, to dissent from the decision of the House of Lords in *Goodman v. Mayor of Saltash* (1), and it is incredible that any of them would have dissented from that and similar decisions without making any reference to them whatsoever. In every one of the judgments in which those dicta occur it will be found—I think I am speaking accurately—that, although many cases are referred to, no reference is made to any one of the decisions to which I referred just now. In those circumstances it appears to me that it would be quite wrong to regard the dicta in question as in any way affecting the decisions which establish the principle that a gift or trust for the inhabitants of a particular place is a good charitable gift or trust. That this comes within this principle seems to me to be clear. England is a larger district, of course, than a county, but it is impossible, in my opinion, to distinguish this case from those by reference to the size of the particular district which has been selected by the testator.

For these reasons I agree that the appeal of the Attorney-General must be allowed.

Appeal of the Attorney-General allowed.

The order of the Court of Appeal, which was dated October 28, 1931, was as follows:—

UPON two several motions by way of appeal on 26th Oct., 1931, 27th Oct., 1931, and this day made unto this Court by counsel for the defendants His Majesty's Attorney-General and His Majesty's Solicitor-General respectively from the order dated 2nd July, 1931 (1) as to the appeal of His Majesty's Attorney-General that so much of the said order as declares that upon the true construction of the will of the above-named testator

Theodore Wynford Smith the residuary gift therein contained "unto my country England to or for own use and benefit absolutely" does not constitute a valid charitable gift or operate in favour of His Majesty's Treasury and is undisposed of by the said will might be varied by declaring that the said residuary gift is a valid charitable gift and that it might be ordered that the plaintiff should pay and transfer the residuary estate of the said testator to the Solicitor for the Affairs of His Majesty's Treasury or such other person as His Majesty should direct to be applied for charitable purposes under the directions of His Majesty AND (2) as to the appeal of His Majesty's Solicitor-General that so much of the said order as declares that the said residuary gift does not operate in favour of His Majesty's Treasury and is undisposed of by the said will might be varied by declaring that upon the true construction of the said will the said gift operates as a gift to His Majesty in right of His Crown and UPON HEARING counsel for the respondents to the two said motions such respondents in the 1st mentioned motion being the plaintiff and the defendants other than His Majesty's Attorney-General and in the 2nd above mentioned motion being the plaintiff and the defendants other than His Majesty's Solicitor-General and UPON READING the said order THIS COURT DOTH ORDER that the said order dated 2nd July, be varied so far as the same declares that upon the true construction of the said will of the above-named testator Theodore Wynford Smith the residuary gift therein contained "unto my country England to and for own use and benefit absolutely" does not constitute a valid charitable gift or operate in favour of His Majesty's Treasury and is undisposed of by the said will And in lieu thereof THIS COURT DOTH DECLARE that the said residuary gift is a valid gift for charitable purposes.

AND THIS COURT DOTH ORDER that the plaintiff do pay and transfer the residuary estate of the said testator to such person as His Majesty shall direct under His Sign Manual.

AND IT IS ORDERED that it be referred to the Taxing Master to tax as between solicitor and client the costs of the appellants and of the said respondents respectively occasioned by these appeals.

AND IT IS ORDERED that such costs when taxed as aforesaid be raised retained and paid by the plaintiff out of the estate of the said testator.

Solicitors : *Treasury Solicitor ; Sharpe, Pritchard & Co., for W. C. Cripps, Son & Harries, Tunbridge Wells ; Walter Crimp & Co., for Harold Michelmores & Co., Newton Abbot.*

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July 29.*Ex parte* FENTON TEXTILE ASSOCIATION, LIMITED.*Bankruptcy—Deed of Arrangement—Debtor indebted to a Company—Guarantee by Debtor to certain Banks of Company's own Debt to Banks—Suretyship—Company admitted to Prove against Debtor's Estate—Company in Liquidation—Dividend declared by Trustee of Debtor—Right of Company to Dividend—Admitted Proof of Banks—Right of Set-off.*

F., having guaranteed advances by certain banks to the T. Association, in which he was interested, subsequently executed two deeds of arrangement in favour of his creditors. The Association having gone into liquidation, the liquidator lodged a proof against F.'s estate in respect of sums due by F. to the Association. The trustee of F.'s estate rejected the proof and claimed to set off the various sums which had been advanced by the banks to the Association for which F. had given his personal guarantee. At that time, although one or more of the banks had proved against F.'s estate under the guarantees, nothing had been paid to any of them. The Association was admitted to prove against F.'s estate for a very large sum, and the trustee declared an interim dividend of 1s. in the pound. The banks were paid the dividend in respect of their admitted proofs, which also amounted in the aggregate to a considerable sum. The sums constituting the amount of the banks' proofs represented the amount of the Association's debt which had been guaranteed by F.

The question arose whether the trustee of F.'s estate was under the circumstances entitled to pay to the liquidator of the Association the sum representing the interim dividend declared in respect of the admitted proof.

The matter came before the Court by way of motion on behalf of the trustee, the question being whether this declared dividend was properly payable to the liquidator of the Association or the trustee was entitled to withhold payment of all or any part thereof. On behalf of the Association it was urged that the previous proceedings reported in *In re Fenton* (1.) [1931] 1 Ch. 85, had concluded the matter, that the question was now *res judicata*, and that, notwithstanding the payment to the banks of the amount of the dividend since that decision, the liquidator of the Association was entitled to the full dividend in respect of the Association's admitted proof:—

Held, (1.) that the question raised by the motion had not been determined by the Court of Appeal in the previous proceedings, and (2.) that the claim by the trustee to withhold the payment of any part of the dividends payable in respect of the Association's proof failed. The rule against double proof afforded an answer to the trustee's claim to retain the dividends on the admitted proof of the Association so long as any part of the debt due to the banks remained unsatisfied.

The principles laid down in *Cherry v. Boulton* (1839) 4 Myl. & Cr. 442, 447, 448 followed.

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Henry Fenton, having in 1920 guaranteed advances by certain banks to the Fenton Textile Association (hereinafter called "the Association"), in which he was interested, subsequently in 1921 executed two deeds of arrangement in favour of his creditors. In 1923 the Association was compulsorily wound up, and in 1927 the liquidator presented to the trustee under the two deeds a proof against the estate of Henry Fenton in respect of a very large sum due by Fenton to the Association. This claim was rejected by the trustee, who claimed to set off against the total amount of the credit items certain sums, the repayment of which Henry Fenton had, as above mentioned, guaranteed to the banks on behalf of the Association.

The banks proved against Fenton's estate under the deeds of arrangement for the full amount of the several guarantees, but with the exception of the interim dividend hereinafter mentioned in the judgment of the learned judge, nothing had been paid to them.

The matter having come before the Court on a previous motion by way of appeal by the liquidator on the rejection of the Association's proof by the trustee, it was held by the Court of Appeal that inasmuch as none of these sums had in fact been paid by Fenton or his trustee to the banks, the trustee was not entitled under s. 31 of the Bankruptcy Act, 1914, to set off Fenton's contingent liability under the guarantees against the sums due by him to the Association.

The decision on this point is fully reported in *In re Fenton* (1.). (1) The matter now came before the Court by way of a further motion by the trustee of the two deeds of arrangement above referred to, one of the questions for determination being whether the trustee should—having regard to the fact that an interim dividend had been subsequently declared by the trustee in respect of the admitted proof of the Association—pay to the Association, the respondents, any, and if so what, dividend in respect of their proof as creditors directed by the above mentioned order

(1) [1931] 1 Ch. 85.

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The further facts arising on the declaration of the dividend by the trustee consequent on the decision of the Court of Appeal are more fully referred to in the judgment of the learned judge.

Tindale Davis for the trustee. Although the matters involved in the various transactions of Henry Fenton and the Fenton Textile Association came before the Court of Appeal in previous proceedings (see *In re Fenton* (1)), the particular point now raised by this motion of the trustee was not dealt with by the Court.

[He referred to *In re Leeds and Hanley Theatres of Varieties, Ltd.* (2); *In re Mayne* (3); *In re Rhodesia Goldfields, Ltd.* (4); *In re Peruvian Ry. Construction Co., Ltd.* (5); *In re National Live Stock Insurance Co., Ltd.* (6); *In re Melton.* (7)]

W. N. Stable for the Fenton Textile Association. This particular point now before the Court was discussed by the Court of Appeal when the matter was previously heard (see *In re Fenton* (1)), and was decided then. The question was concluded by their decision and cannot be reopened.

[LUXMOORE J. It seems to me that the actual point I have to decide here was never thought of by the Court of Appeal during the argument in *In re Fenton*. (1) As I understand the argument and the judgment of the Court of Appeal, it is: here is somebody who has paid nothing wanting to set off something he has not paid against the full amount, and they held there was no right of set-off.]

It is submitted that the whole matter has been fully threshed out in the Court of Appeal.

[LUXMOORE J. The case of *Cherry v. Boulton* (8) was not mentioned, and the point you emphasize only referred to indirectly.]

(1) [1931] 1 Ch. 85, 110.

(2) [1904] 2 Ch. 45.

(3) [1907] 2 K. B. 899.

(4) [1910] 1 Ch. 239, 244, 247.

(5) [1915] 2 Ch. 144, 150; *ibid.*

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(6) [1917] 1 Ch. 628.

(7) [1918] 1 Ch. 37, 53.

(8) (1838) 2 Keen, 319; (1839) 4 Myl. & Cr. 442.

On this point, whether the matter is *res judicata*: see the LUXMOORE case of *In re Hilton*. (1) The question now raised by this motion cannot now be reopened.

On the question as to the principle of a creditor claiming to be paid without first paying sums for which he may be liable, the cases fall more or less into three categories. First of all are cases regarding companies: *In re Leeds and Hanley Theatres of Varieties, Ltd.* (2) Here the Association never had any part of Fenton's estate: see also *In re Rhodesia Goldfields, Ltd.* (3); and *In re Mayne* (4), which although relied on by the trustee are not anything like this case now before the Court. The case of *In re Towndrow* (5) it is submitted really marks the limit of the principle that a trustee beneficiary, who is in default, must first make good what he owes the fund before he can derive any benefit from it. For a statement as to the foundation of the principle see *In re Melton*. (6) Here the Association never has had a fund in hand out of which they can possibly pay themselves. Though these cases have been cited, they have really no application to the present one before the Court. It is a case of set-off: *Cherry v. Boulton*. (7)

It is submitted that the decision of the Court of Appeal in *In re Fenton* (8) is to the effect that the Association is not a debtor to the fund.

On the question of suretyship for a debt, see *In re Sass* (9), and Lord Eldon's remarks in an old case, *Ex parte Rushforth*. (10)

[LUXMOORE J. referred to *In re Parker*. (11)]

The Association is entitled to prove and to receive the dividend on the whole amount of the proof. The only principle applicable here is that laid down by the Court of Appeal, that the surety has really no appreciable remedy at all, his only right being to get from the bank any surplus

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(1) (1892) 9 Morr. 286, 290.

(2) [1904] 2 Ch. 45.

(3) [1910] 1 Ch. 239, 244, 247.

(4) [1907] 2 K. B. 899.

(5) [1911] 1 Ch. 662.

(6) [1918] 1 Ch. 37, 53.

(7) 2 Keen, 319; 4 Myl. & Cr. 442.

(8) [1931] 1 Ch. 85, 110.

(9) [1896] 2 Q. B. 12.

(10) (1805) 10 Ves. 409, 414.

(11) [1894] 3 Ch. 400, 407.

LUXMOORE J. dividend there may be, and in this particular case there is not any. The appeal of the trustee should be dismissed.

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Tindale Davis in reply. The only question before the Court of Appeal in *In re Fenton* (1) was whether there was a set-off or not. As to the date when the set-off is to accrue: see *In re Daintrey*. (2)

It is submitted the principle here is really not a question of set-off at all, it is something beyond set-off. It is really a question of one person, out of a total number on whom there is an obligation to do something, receiving something which he is not entitled to keep until he has put back into the total fund the sum of money he has received: *In re Mayne*. (3)

One must also carefully consider Astbury J.'s decision in *In re National Live Stock Insurance Co., Ltd.* (4)

[LUXMOORE J. It seems to me as if Fenton's estate was in the same position as Boulton's was in *Cherry v. Boulton*. (5)]

Not quite. The question is one of altering the proportions payable to the body of creditors: *In re Peruvian Ry. Construction Co., Ltd.* (6), which follows *Cherry v. Boulton* (5); also see *Stammers v. Elliott* (7), which is cited in Cordery on Solicitors, 3rd ed., p. 372; *In re Brown & Gregory, Ltd.* (8)

Cur. adv. vult.

July 29. LUXMOORE J. By this motion the trustee of a deed of arrangement and a supplemental deed, both executed by Henry Fenton for the benefit of his creditors, seeks to have the question determined whether he ought, in the events which have happened, to pay to a company called the Fenton Textile Association, Ltd. (one of those creditors), any and what dividend in respect of their admitted proof.

The question which I have now to determine arises in this way. The Association was admitted under an order of the Court of Appeal dated May 30, 1930, to prove in respect of

(1) [1931] 1 Ch. 85, 110.

(2) [1900] 1 Q. B. 546.

(3) [1907] 2 K. B. 899.

(4) [1917] 1 Ch. 628, 631.

(5) 2 Keen, 319, 325; 4 Myl. &

Cr. 442, 447.

(6) [1915] 2 Ch. 144, 150, 151; in C. A. *ibid.* 442.

(7) (1868) L. R. 3 Ch. 195, 199.

(8) [1904] 1 Ch. 627.

a sum of 436,192*l.* The trustee has declared an interim dividend of 1*s.* in the *£*. In the absence of any special circumstances, the Association would obviously be entitled to participate in this dividend. Among the creditors of Henry Fenton admitted to prove under the deeds of arrangement are certain banks. It is admitted that the banks' proofs amount in the aggregate to 176,795*l.* The banks have been paid in respect of their proofs the interim dividend of 1*s.*, amounting to the total sum of 8839*l.* 15*s.* The whole of this 176,795*l.* represents sums for which Henry Fenton became liable to the banks as surety for the Association, he having guaranteed the Association's banking accounts for sums in excess of the total sum mentioned. It is also admitted that until the dividends amounting to 8839*l.* 15*s.* were paid to the banks, no payments were in fact made by Henry Fenton or by the trustee of the deeds of arrangement in respect of the guarantees given to the banks. If the Association were solvent there could be no question but that the trustee would either be entitled to recover from the Association the 8839*l.* 15*s.* so paid to the banks, or he could retain it out of any sum payable by way of dividend or otherwise to the Association. The Association, however, is insolvent and the affairs are in process of being wound up by the Court. It is necessary to consider what effect this fact has on the legal position of the Association and the trustee of the deeds of arrangement as representing the creditors of Henry Fenton.

Mr. Tindale Davis has argued that the position is governed by a series of decisions of which the well known case of *Cherry v. Boulthbee* (1) is the leading example, and he claims that so long as the Association is indebted, whether presently or contingently, to Henry Fenton's estate, no dividend can be received by the Association. Mr. Stable, on the other hand, on behalf of the liquidator of the Association, claims that the decision of the Court of Appeal on an earlier motion by the Association against the trustee under the deeds of arrangement has settled the question in his favour, and that

(1) 2 Keen, 319; 4 Myl. & Cr. 442.

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LUXMOORE J. notwithstanding the alterations in the circumstances by reason of the payment to the banks under the several guarantees of 8839*l.* 15*s.*, the Association is still entitled to receive the full dividend on its own proof in precisely the same manner as if no payment had in fact been made under the guarantees.

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It is necessary, therefore, to consider the decision of the Court of Appeal to which I have referred. It is *In re Fenton* (1), and the question before the Court was whether the trustee under the deeds of arrangement was entitled to set off against the total sum due from Fenton's estate to the Association, the amount for which the banks had been admitted to prove against Fenton's estate in respect of the guarantees he had given to the banks on behalf of the Association; although no payment had then been made to the banks. The Court of Appeal refused to allow the set-off on the ground that to do so would be to disregard the rule against double proof, for it was established in the Court of Appeal (contrary to the admissions made when the case was before me) that the banks, or some of them, had been admitted to prove against the Association as the principal debtors for part at any rate of the amounts sought to be set off.

The Master of the Rolls, in the course of his judgment, said this: "If the trustee of Fenton's estate were allowed to set off the debt due to the banks which Fenton guaranteed, he would exercise that right in respect of the same debt for which the largest creditor bank has already proved, and the other two can prove. It would in effect be a double proof. But it would be more: it would be an allowance to Fenton's estate in full of a debt due to another which Fenton has not paid himself; with the result that Fenton's general creditors would benefit to the extent of the debt which is primarily due from the Association to the banks. The rule, therefore, against double proof also prevents Fenton's trustee from setting off this liability of Fenton's to the banks which has not crystallized into a debt due to Fenton. I desire to add that this judgment is not intended to determine that Fenton's

(1) [1931] 1 Ch. 85, 110, 115, 116, 118, 119.

trustee may not in some events have a provable debt within s. 30, sub-ss. 3 and 8, in the liquidation of the Association. It may be that he will ; but when and at what value are questions that we have not to decide. Our judgment is that at the present time Fenton's trustee has not a right to set off his contingent liability under s. 31, which provides and requires a particular machinery for the set-off of mutual debts and does not conclude all the rights and questions that may arise." Lawrence L.J. also said : " In these circumstances, I am of opinion that although the claim to indemnity by the trustee of Fenton's estate is a provable debt arising out of a mutual dealing between the Association and Fenton, it cannot be set off against the debt due from Fenton's estate to the liquidator of the Association under s. 31, because the mutual dealing, at the time when the account under s. 31 has to be taken, has not by reason of the rule against double proof resulted in any sum becoming due from the Association to the trustee of Fenton's estate which could properly be entered on the debit side of the account." Romer L.J. also said in delivering his judgment : " But I cannot agree that a surety who has not paid off the principal creditor can prove in the bankruptcy of the principal debtor so as to share in the distribution of his assets unless the principal creditor has renounced in some way his right to lodge a proof himself while preserving, of course, his rights against the surety. To allow such a sharing in the assets would be to subject the assets to two claims in respect of the same debt, and this is contrary to the well established rule in bankruptcy against double proof."

There is nothing in any of the judgments of the learned Lords Justices to suggest that they considered what would be the legal position as between the Association and the other creditors of Henry Fenton if he or the trustee of the deeds of arrangement had in fact made any payment to the banks in part discharge of Fenton's liability as surety. Mr. Stable has referred me to the shorthand note of the argument before the Court of Appeal, and though it appears that there was some discussion on the subject, I think it is

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LUXMOORE sufficiently plain from the passages to which I have already referred in the judgments of the respective members of the Court of Appeal that the Court never intended to do anything more than determine the question whether there was a right of set-off or not. In my judgment Mr. Stable's contention that the question which is raised by this motion has already been decided by the Court of Appeal and is *res judicata*, cannot be supported.

It is, therefore, necessary for me to consider and determine whether the principle enunciated in *Cherry v. Boulton* (1), and developed in the later cases—namely, *In re Leeds and Hanley Theatres of Varieties, Ltd.* (2); *In re Akerman* (3); *In re Rhodesia Goldfields, Ltd.* (4); and *In re Peruvian Ry. Construction Co., Ltd.* (5), applies to the present case. The principle is clearly stated by Sargant J. in the last mentioned case as follows: "Where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute." This principle obviously applies where the person to make the contribution is solvent, but if he happens to be insolvent then the position must be considered in the light of the law governing insolvent persons.

It appears to me to have been decided in *Cherry v. Boulton* (1), that if the person to make the contribution is insolvent at the time when the contribution is to be made, the persons entitled to receive the contribution cannot be entitled to receive more than the dividend appropriate to the amount to be contributed. Lord Cottenham said in that case: "In the present case the bankruptcy of the debtor having taken place in the lifetime of the testatrix, her executors never were entitled to receive from the assignee more than the dividends upon the debt; and although the bankrupt had not obtained his certificate, and the liability incident to that state remained upon him, yet he, for the

(1) 4 Myl. & Cr. 442, 447.

(3) [1891] 3 Ch. 212.

(2) [1904] 2 Ch. 45.

(4) [1910] 1 Ch. 239.

(5) [1915] 2 Ch. 144, 150, 152, 153.

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same reason, was never entitled to receive the legacy; and consequently, there never was a time at which the same person was entitled to receive the legacy and liable to pay the entire debt; the right, therefore, of retaining a sufficient sum out of the legacy to pay the debt can never have been vested in any one. The assignees who claim the legacy would, indeed, have been liable to the payment of any dividend upon the debt, had it been proved; and the Master of the Rolls proposed to the executors to make provision for deducting the amount of such dividend from the amount of the legacy."

As Sargant J. pointed out in *In re Peruvian Ry. Construction Co.* (1), that part of the decision in *Cherry v. Boulton* (2) has never been questioned or dissented from in any way and has been frequently followed. He further pointed out that this special feature—namely, the insolvency of the contributor, if I may so style the person liable to make the contribution, was entirely absent in the cases of *In re Akerman* (3); *In re Goy & Co., Ltd.* (4); *In re Rhodesia Goldfields* (5); and *In re Brown & Gregory, Ltd.* (6), all of which cases were cited to me and relied on by Mr. Tindale Davis.

In my judgment, apart from any question arising out of the relationship of principal creditor, principal debtor, and surety existing between the banks, the Association and Henry Fenton respectively, the fact that the Association was in liquidation before any payment was made by or out of the surety's estate would have limited the trustee's right of retainer or quasi set-off—to use the nomenclature adopted by Sargant J. in *In re Peruvian Ry. Construction Co., Ltd.* (7)—to a sum equal to the appropriate dividend in the liquidation of the Association in respect of the amount which the Association would have been bound to contribute if solvent.

But the position is further complicated by the fact that the banks have already proved or are entitled to prove against the assets of the Association in respect of the whole of the

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(1) [1915] 2 Ch. 144, 150, 152, 153.

(4) [1900] 2 Ch. 149.

(2) 4 Myl. & Cr. 442, 447.

(5) [1910] 1 Ch. 239.

(3) [1891] 3 Ch. 212.

(6) [1904] 1 Ch. 627.

(7) [1915] 2 Ch. 144.

LUXMOORE sum guaranteed, and consequently if the trustee of the deeds of arrangement should retain out of the dividend payable to the Association a sum equal to the dividend on the total amount due to the banks under the guarantee, there would in effect be an allowance against the Association of two dividends in respect of what is for all practical purposes the same debt, and so the rule against double proof would be infringed. It is true that the right of retainer under the principle I have referred to is not correctly described as a set-off, and has repeatedly been stated to be a higher right and to rest on quite different principles, and that the decision of the Court of Appeal does not in terms cover the present case; yet I am satisfied that the same ground—namely, the rule against double proof—that was held by the Court of Appeal to preclude the right of set-off in the present case also affords an answer to the claim of the trustee to retain the dividends on the admitted proof of the Association or any part of such dividends at any rate so long as any part of the debt due to the banks remains unsatisfied.

It follows from what I have said that the claim of the trustee of the deeds of arrangement to withhold any part of the dividends payable in respect of the Association's proof fails. The motion will be dismissed and I will order the trustee to pay the Association's costs.

Solicitors: *Blundell, Baker & Co., for Mumfords & Gordons, Bradford; Stephenson, Harwood & Tatham.*

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Patent — Practice — Threats Action — Statement of Claim — Allegation of Invalidity of Defendant's Patent — Application to strike out — Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 36 — Patents and Designs Act, 1919 (9 & 10 Geo. 5, c. 80), Schedule.

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The amendment of s. 36 of the Patents and Designs Act, 1907, by the Patents and Designs Act, 1919, was not intended to abrogate the rule which had prevailed ever since *Challender v. Royle* (1887) 36 Ch. D. 425 was decided that a plaintiff in a threats action might, if he so desired, raise the question of the validity of the patent. The obvious reason for the amendment was to widen the scope of the section so as to enable a threats action to be brought not merely against the patentee, but against any person claiming to have an interest in the patent. The alterations in the subsequent part of the section were consequential upon the main alteration, and were not intended to, and did not in fact, abrogate the rule which was laid down in *Challender v. Royle*, 36 Ch. D. 425.

So held by the Court of Appeal, affirming the decision of Luxmoore J.

MOTION.

The action was brought by the plaintiffs to restrain the defendants from alleging that the plaintiffs had infringed certain letters patent.

The plaintiffs were a firm having an exclusive licence for the sale and manufacture in the British Empire and all Dominions, with the exception of Canada, of the Sesci Rotary Melting Furnace, and had at all material times sold and offered for sale the same in this country.

The defendants claimed to have an interest in letters patent Nos. 283,381 and 306,141.

The plaintiffs by para. 3 of their statement of claim alleged that the defendants had threatened and continued to threaten customers and would-be customers of the plaintiffs in correspondence and by advertisement with legal proceedings in respect of certain furnaces sold or offered for sale by the plaintiffs and known as "Sesci" furnaces, which the defendants in such correspondence and advertisements alleged were infringements of the aforesaid letters patent.

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The plaintiffs claimed an injunction restraining the defendants from threatening in correspondence or by circulars, advertisement or otherwise with legal proceedings or liability any company, firm or person using or selling or offering for sale or dealing in rotary furnaces manufactured and/or sold or supplied by the plaintiffs, alleging the same to be infringements of the letters patent Nos. 283,381 and/or 306,141, or any other British letters patent in which the defendants claimed an interest; damages; costs.

On July 24, 1931, the plaintiffs moved before Luxmoore J. for leave to amend their statement of claim in the following particulars: (1.) by adding to para. 3 an allegation that the alleged infringements were not, nor was any of them, an infringement of either of the said patents; and (2.) by adding a fresh paragraph (para. 4) alleging that each of the said patents was, and ever since its grant had been, invalid, and stating the grounds on which they relied in respect of this allegation. The addition of the first allegation was not seriously contested by the defendants, but they objected to the second amendment, which attacked the validity of the letters patent in question.

The question turned upon the true construction of s. 36 of the consolidated Patents and Designs Acts, 1907 and 1919, and it was contended by the defendants that it was no longer open to a plaintiff in a threats action to attack the validity of the letters patent.

Sect. 36 of the Act of 1907, as amended by the Act of 1919 by the omission (*inter alia*) of the words in italics, provides: "Where any person claiming (*to be the patentee of an invention*) to have an interest in a patent, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of (*any legal rights of the person making such threats*) the

patent. (*Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent.*)
 Provided that this section shall not apply if an action for infringement of the patent is commenced and prosecuted with due diligence."

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Sir Arthur Colefax K.C. and *C. J. G. MacGuckin* for the applicants. The patents in which the defendants claim an interest are invalid, and an invalid patent cannot be infringed. The infringement of a patent means the infringement of the monopoly, and you cannot infringe a non-existent monopoly. The question of allowing an amendment to the statement of claim in a case like the present is not one in which the Court can exercise a discretion. It is really a question of the construction of a particular section; in this case s. 36 of the Patents and Designs Act, 1907, as amended by s. 20 and the Schedule to the Patents and Designs Act, 1919. (1)

K. E. Shelley for the respondent. The plaintiffs cannot now impugn the validity of these patents. This procedure has been altered by the combined effect of the Patents and Designs Acts, 1907 and 1919, s. 36 and Schedule, and cannot now be allowed.

Sir Arthur Colefax K.C. in reply.

LUXMOORE J. The question which I have to determine arises on an application for leave to amend the statement of claim in an action which has been brought to restrain

(1) Patents and Designs Acts, 1907 and 1919 (s. 36 and Schedule):
 "Where any person claiming [to have an interest in a patent], by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction

against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of [the patent].

"[Provided that this section shall not apply if an action for infringement of the patent is commenced and prosecuted with due diligence.]"

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the defendants from alleging that the plaintiffs have infringed certain letters patent.

The amendments sought fall under two heads. The first amendment alleges that there was in fact no infringement of the patent. No objection is raised to it. There is however an objection to the second amendment, which seeks to attack the validity of the letters patent in question. The defendants are not the legal owners of the letters patent. It is said that under the present provisions of s. 36 of the consolidated Patents and Designs Acts, 1907 and 1919, it is no longer open to a person who is bringing an action to restrain threats to attack the validity of the letters patent. Sect. 36 replaces s. 32 of the Patents Act of 1883, with the amendments which have been added by s. 20 of the Act of 1919. Sect. 32 of the Act of 1883 as it originally stood was as follows (1): [His Lordship read the section and continued:] Under that section the only person against whom the action could be brought was the patentee.

There is no question about it that ever since the case of *Challender v. Royle* (2) (which was decided in 1887 by the Court of Appeal) the plaintiff in a threats action has been considered to be entitled to attack the validity of the patent itself. As Cotton L.J. pointed out in his judgment in that action: "The Court must be satisfied at the hearing of the action that the articles in respect of which the threats were made are not 'an infringement of any legal rights of the

(1) Patents, Designs, and Trade Marks Act, 1883, s. 32: "Where any person claiming to be the patentee of an invention, by circulars advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture use sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such

damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats:

"Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent."

(2) 36 Ch. D. 425, 435, 443.

person making such threats.' The question, therefore, whether the patent of the person making the threat is a valid patent, must, in my opinion, come into consideration if the plaintiff in the action seeks to have it considered, because I cannot see how, if the patent is invalid, there can be any act done in infringement of a legal right of the patentee." Then he said he mentioned it because Chitty J. had intimated an opinion to the contrary in another case. Bowen L.J. said something to the same effect, where he said: "The right conferred by this section is a right not to be threatened if the manufacture which is complained of was not in fact an infringement, and I think a person applying for an injunction against threats ought to make out a *prima facie* case that the matter to which the threats related was not in fact an infringement. I also wish to add that, though I am always extremely reluctant to travel one hair's breadth out of the case before us, I think it is necessary to express an opinion, not a final judgment, that in an action of this nature the question of the validity of the defendant's patent may be raised."

The object of the amendment to s. 36 which was brought into it by s. 20 of the Act of 1919 is to enable a person threatened in respect of an alleged infringement of the patent to bring an action not only against the patentee, but also against any person having an interest in the patent, and for that purpose the words "where any person claiming to be the patentee of an invention" were altered so as to read: "where any person claiming to have an interest in a patent." Of course, when that alteration was made, it was necessary to make an alteration with regard to the latter part of the section. The section provides that the person aggrieved may bring an action to restrain the continuance of the threats, and may recover such damage, if any, as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of—and then the words "any legal rights of the person making such threats" were struck out, and the words "the patent" substituted for them, so as to cover all those persons against whom the

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C. A. action could now be brought. It could not stand as it was,
1931 because the person making the threats might not have any
legal rights in respect of the patent.

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In those circumstances, it is said that the section has really altered the law, and that the person bringing an action in respect of threats now is no longer able to challenge the validity of the patent, whether such threats be made by the patentee or by a person interested in it. I think that such a construction would be contrary to the canons of construction applicable to Acts of Parliament. In construing an Act of Parliament one has to look at what was the mischief that was intended to be remedied and to see exactly what the scope of the alteration is and the reason for it. In the present case the object of the Act was to enable a person injured by threats of infringement actions to prevent those threats being made without foundation not only by the patentee but by other persons. In other words, the object was to widen the remedy, not to narrow it. In the circumstances I can see no reason why it should no longer be open to a person bringing an action to restrain threats to attack the validity of the patent. It may be that there are circumstances under which it might inflict hardship to attack the validity of the patent in the absence of the patentee; but again there may be circumstances in which, although the legal owner of the patent is absent, it may be impossible to deal with the case unless the validity is in fact challenged. I do not think this was intended in any way to limit the rights of a person who was entitled to bring an action in respect of threats. In order to limit those rights as suggested by Mr. Shelley, it would be necessary to construe the words "infringement of the patent" in the strictest possible sense as excluding any right to challenge the validity of the patent, although in fact there can be no effective infringement if the patent is not valid. In my view, it is still open in an action to restrain threats under this section to challenge the validity of the patent, because I do not think that any alteration of the law has been intended or effected by the alteration of the wording of the latter part of the section.

That being so, I think I am entitled in this case to allow the amendments which are sought to be made in the statement of claim. The first one has been agreed to already. The second, I think, should be allowed; and I accordingly allow it.

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The defendants appealed. The appeal was heard on October 12, 26, 1931.

In pursuance of the leave given by Luxmoore J. the plaintiffs had amended their statement of claim by adding at the end of para. 3 the following statement: "The alleged infringements were not, nor was any of them, an infringement of either of the said patents," and by adding the following paragraph (para. 4): "Each of the said patents is and ever since its grant has been invalid. The plaintiffs will rely in support of want of novelty and subject-matter in each of the said patents upon the prior publication of the specification of British Letters Patent No. 1868 of 1892 (Siemens) and the public general knowledge of the relevant art. They will also rely upon want of utility as against each of the said patents and upon the prior specification of the said patent No. 283,381 in support of want of novelty and subject-matter in the said patent No. 306,141."

Trevor Watson K.C. and *K. E. Shelley* for the appellants.

Sir Arthur Colefax K.C. and *C. J. G. MacGuckin* for the respondents.

The arguments, which were substantially the same as those used in the Court below, fully appear from the judgments of the Court of Appeal.

LORD HANWORTH M.R. This is an appeal from a decision of Luxmoore J. upon an application allowing the plaintiffs to amend the statement of claim in an action to restrain the defendants from alleging that the plaintiffs have infringed certain letters patent.

The point is somewhat technical, but the question is in substance whether, in an action for threats under s. 36 of the Consolidated Patents and Designs Acts, 1907, 1919, it is

C. A. possible to raise (as between the parties only) the question
 1931 of the validity of a patent. Luxmoore J. goes through the
 PITTEVIL history of the present s. 36 and takes note of the judgments
 & Co. of Cotton and Bowen L.JJ. in *Challender v. Royle*. (1)
 v.
 BRACKELS- Cotton L.J., speaking of the section which stood then in
 BERG the Act of 1883, said (2): "In my opinion, and after
 MELTING the discussion we have had I am bound to state it, the
 PROCESSES, validity of the patent could come in question. In order
 LD.
 Lord Hanworth that the Court may be satisfied whether there is or is not
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 an infringement of any legal right, one of the questions must
 be, if the plaintiff chooses to raise it, whether the defendant's
 patent is or is not valid." Bowen L.J. said (3): "I also
 wish to add that, though I am always extremely reluctant
 to travel one hair's breadth out of the case before us, I think
 it is necessary to express an opinion, not a final judgment,
 that in an action of this nature the question of the validity
 of the defendant's patent may be raised." That appears
 to us to be an authoritative statement of the law as
 it stood at that time. When the Patents and Designs
 Act, 1907, was passed, it is conceded that it reproduced the
 section as to threats in terms which, if not literatim the same,
 are in pari materia for all purposes the same as when that
 authoritative decision was given.

But since that passing of the Act of 1907 the Patents
 and Designs Act, 1919, has widened the effect of s. 36 of
 the former Act. The previous section opened with:
 "Where any person claiming to be the patentee of an inven-
 tion," confining the benefit to the actual patentee. In
 order to widen it the words now stand: "Where any person
 claiming to have an interest in a patent." One must take
 note, as Luxmoore J. has rightly pointed out, of the
 purpose for which an alteration in a section is made. But
 it is said that, although the section has been widened,
 although there was the clear decision standing from 1887 to
 the effect to which I have already referred, yet the amend-
 ment of s. 36 was such as to preclude the question

(1) 36 Ch. D. 425.

(2) 36 Ch. D. 435.

(3) 36 Ch. D. 425, 443.

of the validity of the patent from being raised in what I will call a threats action. How is that done? It is said to have been done in this way. First of all, the words at the end of the section of the 1907 Act, which were "any legal rights of the person making such threats," have been eliminated and the words "the patent" have been substituted. It is said: "If you will turn to the interpretation section you will find that the word 'patent' means 'letters patent for an invention'; and if your diligence will carry you further and you will look to see what an 'invention' is you will find that 'invention' includes 'an alleged invention.'" The word "includes" should be noted; it is wide enough, that is to say, to embrace and cover an alleged invention, but it does not say that under all circumstances it is to be interpreted as synonymous with "alleged invention." It is said that by virtue of the word "patent" so interpreted the value of the section has been cut down, and the decision in *Challender v. Royle* (1) overruled with the result that the validity of a patent cannot now be disputed in a threats action. I have looked to see where these amendments of s. 36 are to be found in the Patents and Designs Act, 1919. It is interesting to note that they are to be found not in the body of the Act which, section by section, deals with important alterations in the Act of 1907; they are said to be contained in the Schedule which purports to make minor amendments of the principal Act. I cannot help feeling that, according to the canons of interpretation, if so important an alteration had been intended by using the word "patent" at the close of s. 36, the proper place for such an amendment would have been in a substantive section of the Act. After considering the judgment of Luxmoore J., I have come to the same conclusion and upon the same ground, and I have only ventured to add some observations of my own because it has struck me that the suggested alteration in the purpose of the section cannot be upheld by the alteration of the words as a minor amendment of the Act. We therefore hold, on the substantive

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(1) 36 Ch. D. 425.

C. A. and important question which was raised before this Court,
1931 that the appellants cannot succeed.

PITTEVIL We had to determine, when the case was before us on the
& Co. last occasion, what was the exact position on the pleadings ;
v. and here we found ourselves in this position—and, indeed,
BRACKELS- we said to Mr. Trevor Watson—that the point which was
BERG taken in form was one which might have interested Parke B. in
MELTING we said to Mr. Trevor Watson—that the point which was
PROCESSES, taken in form was one which might have interested Parke B. in
LD. days long ago in the Court of Exchequer, but did not appeal
Lord Hanworth strongly to us at the present time, when an effort is made to
M.R. overcome literal difficulties in order that the substance of the
matter may be determined by the Court ; and we adjourned the
case in order that it might be discovered what the defendants
intended to allege. The defendants have now amended
their defence, inserting in para. 3 : “ The furnaces in the said
paragraph mentioned are infringements of letters patent ”
Nos. so-and-so ; and upon that, on the argument as it stood
last time, it was clearly, I think I might almost say, conceded
that the plaintiffs would have the right to reply raising the
question of the validity of the patents. The plaintiffs now,
after the amendment of the defence was delivered on
October 19, still have time to deliver a special reply, and
they will, if leave is necessary to them, have liberty so to
do ; and, incidentally, as it may be convenient to them to
have it, they will have liberty, if they think right, to deliver
the reply and to give notice that they will stand by and hold
to para. 4 in the statement of claim ; or, if they prefer it, may
transfer that to the reply ; and they have the right also to
transfer it in an amended form, because they have the right
to deal with the matter now pleaded in the amended defence
by way of a special reply. These, of course, are details
of comparatively little importance.

In the result, the Court agrees with the decision of
Luxmoore J. that the issue of validity of the patents
can be raised, affirms the decision in *Challender v.*
Royle (1), and accordingly holds that the alteration of
s. 36 has not cut down the right to raise the question of
validity.

(1) 36 Ch. D. 425.

In these circumstances, the appeal is dismissed with costs, subject to the liberty which we have given to the plaintiffs as to their claim and their reply.

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LAWRENCE L.J. I agree. In my judgment the amendment of s. 36 by the Act of 1919 was not intended to abrogate the rule which has prevailed ever since *Challender v. Royle* (1) was decided in the year 1887, that the plaintiff may, if he so desires, raise in a threats action the question of the validity of the patent. The obvious reason for the amendment was to widen the scope of the section so as to enable a threats action to be brought not merely against the patentee but against any person claiming to have an interest in a patent. In my opinion, the alterations in the wording of the latter part of the section are consequential upon the main alteration to which I have referred and were not intended to, and do not in fact, abrogate the rule laid down in *Challender v. Royle*. (1) Mr. Shelley relied mainly upon the fact that if that rule were held to prevail under the amended form of the section it might result in having the validity of the patent debated and decided in the absence of the patentee. In my judgment that objection is met by the fact that the learned judge who tries the action would undoubtedly see that no injustice is done to the patentee. The patentee, if not a party to the action, would not be bound by any decision in such an action; but in a case in which (though not a party) he might be adversely affected, I have no doubt that the judge would either order him to be added as a party or give him an opportunity to become a party, and thus enable him to be heard on the question of the validity of the patent.

For these reasons I think the appeal fails and ought to be dismissed with costs.

ROMER L.J. I agree. It was definitely settled by this Court in the year 1887 that it was permissible for a plaintiff in a threats action to attack the validity of the patent. Had the Legislature when passing the Act of 1919 intended to deprive plaintiffs in such actions of that right, it would, in my

(1) 36 Ch. D. 425.

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opinion, have done so in clear terms and not have driven us to find the intention to interfere with that right from a detailed examination of the definition section in the Act of 1907. But apart altogether from that, in my opinion the words introduced by amendment to s. 36 by the Act of 1919 have not, on their true construction, that effect. It is perfectly true that if you look at the definition section of the Act of 1907 you will find that a "patent" is a letters patent for an invention, and that an "invention" may include "an alleged invention"; but the words in s. 36 with which we have to deal refer to an "infringement of the patent"; and the word "infringe" connotes, to my mind, a trespass upon some legal right of the patentee. I do not understand how a patent that is invalid can be infringed. The truth of the matter is that when we talk of the infringement of a patent we do not mean an infringement of the document, the letters patent themselves. You cannot infringe a document. We mean an infringement of the monopoly rights conferred by the letters patent. Where, therefore, the Legislature in this amended section talks of "infringement of a patent" it is, in my opinion, talking of an infringement of some monopoly rights, and if those monopoly rights do not exist by reason of the invalidity of the letters patent then, in my opinion, there has been no infringement of the patent, even taking into consideration—as we are bound to take into consideration—the definition clause in the Act of 1907.

Appeal dismissed.

Solicitors for appellants: *Lawrance, Messer & Co.*

Solicitors for respondents: *Godden, Holme & Ward.*

W. I. C.

SAMUELSON *v.* PRODUCERS' DISTRIBUTING
COMPANY, LIMITED.

[1930. S. 2168.]

C. A.

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LUXMOORE
J.

Passing-off — Dramatic Sketch — Cinematograph Film — Advertisement Jan. 27, 28,
representing Film to be Film Version of Sketch. 29, 30;
March 12;
May 22.

The owner of the copyright in a dramatic sketch of which there exists no film version can maintain a passing-off action against the producer of a cinematograph film for representing to the public, contrary to the fact, that his film is a film version of the sketch.

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Oct. 13, 14,
15.

So held by Lord Hanworth M.R., Lawrence and Romer L.JJ., affirming a decision of Luxmoore J.

ACTION.

The plaintiff in the action, a playwright, professionally known as Laurie Wylie, in his statement of claim claimed to be the owner of the copyright in a sketch entitled "The New Car," which had been played as part of a revue or stage play called "Vogues and Vanities," and also as a separate item at various music halls in Great Britain. The sketch was performed under licence to one Harry Day and achieved considerable success, the chief part being played by a well known comedian, Mr. George Clarke. Its notoriety was undoubtedly greatly enhanced by the fact that it was played on May 22, 1930, at the Palladium Music Hall at the Royal Command Performance given in that year before their Majesties the King and Queen.

The defendants claimed to be the owners of a cinematograph film entitled "His First Car." This film, which was popularly known as a "Talkie," was made early in the year 1930, and was first produced at the Carlton Theatre on May 14, 1930. Mr. George Clarke was, in the accustomed term of the trade, "featured" in the film as the principal comedian. It was admitted at the trial that the film was so different from the sketch, "The New Car," that it was impossible to suggest that it infringed in any respect the copyright of the sketch.

The Royal Command Performance received a number of laudatory notices in the press. On May 23, the Daily Telegraph published a long notice headed "King and

C. A. Queen and Variety Stage." One paragraph in this notice,
 1931 under a sub-title printed in capital letters, "The King's
 SAMUELSON Enjoyment," read as follows: "The evening showed us
 PRODUCERS' other triumphs of ability. But mainly it was an evening of
 v. laughter, laughter whole-hearted, irresistible and at times
 DISTRI- uproarious, and nobody in the vast audience seemed to enjoy
 BUTING the fun more than the King and Queen. It was George
 Co. Clarke in Laurie Wylie's capital sketch, 'The New Car,' who
 first set the fun going at high speed."

The plaintiff alleged that the defendants issued advertisements with regard to their film, "His First Car," which were likely to deceive members of the public into the belief that the press notice above referred to might apply to the film, and that these advertisements also showed an intention on the part of the defendants to appropriate the benefit of the notice to their own production. An example of this was seen in an advertisement which appeared in the Cinematograph Times for May 24, 1930. It was printed in red and black ink, and the first line, which stretched across two pages of the journal and was printed in red in large type, read: "The man who made the Queen laugh!" On the next line, the name of "George Clarke" appeared in black ink, and immediately under it, the title, "His First Car," followed by the words: "Come and see the P.D.C. Talkie Version." On the right-hand side of the right-hand page, there was printed what appeared to be an extract from the above mentioned notice in the Daily Telegraph. It was headed: "At the Command Performance, Palladium, May 22," and a comparison of this purported extract with the original article showed that the words, "in Laurie Wylie's capital sketch," were omitted, and the title of the sketch, "The New Car," had been changed for the title, "His First Car."

The writ in this action was issued on May 27, 1930. It claimed an injunction restraining infringement of the plaintiff's copyright, and alternatively an injunction restraining the passing-off of the film, "His First Car," as being an acoustic and visual performance by mechanical means of the plaintiff's literary work, "The New Car," and damages.

Almost directly after the writ was issued the plaintiff abandoned his claim for infringement of copyright, because it was ascertained that no infringement of copyright had in fact taken place. The action was therefore purely one in respect of passing-off.

The defendant company defended the action on three grounds. The first line of defence was that the plaintiff could not maintain the action because he was not in fact the owner of the copyright in the sketch, "The New Car." The second line was that the plaintiff, assuming that he was the owner of the copyright, could not maintain an action for passing-off because the defendant company's trade was that of making films and was a different trade from that of the plaintiff; in other words, that the plaintiff had no cause of action because he had not made a cinematograph film of his sketch which had become known to the public as his property under the particular title, and therefore there could be no passing-off by the defendant company. Thirdly, it was said that, assuming the first and second defences failed, it was not a case for an injunction, because the thing complained of was due to the isolated act of a servant, and the plaintiff was not entitled to recover any damages.

On the evidence adduced the learned judge held that the plaintiff was in fact the owner of the sketch, "The New Car," and as such was the owner of the copyright in it. In his opinion the case fell within the decision in *Levy v. Rutley*. (1) The first line of defence therefore failed.

The only question calling for report was whether, there being no film version of the sketch in existence, the plaintiff could maintain a passing-off action against the defendants for representing their film to be a film version of the plaintiff's sketch.

Gilbert Beyfus for the plaintiff.

F. D. Morton K.C. and *E. J. Macgillivray* for the defendants.

Cur. adv. vult.

(1) (1871) L. R. 6 C. P. 523, 530.

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C. A. May 22. LUXMOORE J. [after stating the facts as substantially set out above, and after holding that the plaintiff was the owner of the copyright in the sketch, "The New Car," as previously stated, continued:] The second line of defence is that the plaintiff cannot maintain an action to restrain passing-off because no film of his sketch has in fact been produced. I do not think there is any substance in this point. The plaintiff, as the owner of the copyright in the sketch, is entitled to the rights of reproduction whether by means of a dramatic performance or by a visual and acoustic representation through the medium of a cinematograph film. I do not think it is correct to say, as was argued by Mr. Macgillivray, that the sketch and the film occupy different spheres of business. To represent, contrary to the fact, that a cinematograph film is a version of a particular work must be calculated to damage the film rights in the particular work. There is no reported case which covers the precise point. It was sought to be raised, but was not decided, in a case recently before Bennett J., *Houghton v. Film Booking Offices, Ltd.* (1), which so far as I am aware has not been reported. My attention was, however, called to two American cases both shortly reported in Macgillivray's Copyright Cases, 1917-23. The first is *Klaw v. General Film Co.* (2), and the second is *Manners v. Triangle Film Co.* (3) In each of those cases it was held that if a stage play has established a public reputation under a particular title, the use of that title as the title of a motion picture play, where there is no similarity between the stage play and the picture play, can be restrained. In my opinion the owner of a copyright work is entitled to prevent any person passing off as and for a cinematograph version of that work something which is not in fact a version of that work, although no cinematograph version of it has in fact been made.

It is necessary, therefore, to consider and deal with the third and last line of defence.

(1) Unreported.

Supp. 988.

(2) (1916) Macgillivray's Copyright Cases, 1917-1923, 86; 154 N. Y.

(3) (1917) Ibid. 103; 244 Fed. Rep. 293.

[His Lordship then dealt with the third line of defence, and, while holding that it was no longer necessary to get an injunction, decided that the plaintiff was entitled to more than nominal damages and directed an inquiry as to damages.]

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The defendants appealed. The appeal was heard on October 13, 14 and 15, 1931.

F. D. Morton K.C. and *E. J. Macgillivray* for the appellants. The plaintiff is not entitled to succeed in his action for passing-off, because the advertisements complained of did not amount to a passing-off. The essential element of passing-off is that there should be an attempt to pass off one man's goods as those of another. In this case the plaintiff had not produced a film founded on his sketch, "The New Car," and what the defendants advertised was a "P.D.C. Talkie Version." The defendants were therefore advertising a film when the plaintiff had none, and there could therefore be no passing-off of the defendants' film as the plaintiff's film. Passing-off is defined in *Metzler v. Wood* (1) as a representation calculated "to mislead the public into believing that, when they were buying the defendant's work, they were buying the plaintiffs'." Here there is no such representation. The defendants have produced something in a different medium from that of the plaintiff's, and a representation that the defendants' film is a film version of the plaintiff's sketch is not passing-off. If not, this action, being a passing-off action, cannot succeed.

[ROMER L.J. The plaintiff has the exclusive right as part of his copyright to make a film version of his sketch, and yet the defendants have produced a film and advertised it as a film version of the plaintiff's sketch. This must be an invasion of the plaintiff's rights in respect of which he is entitled to protection: see Kerr on Injunctions, 6th ed., p. 335.]

That may be so, but it is not passing-off. This point is admittedly a technical point. It was raised in *Raleigh v.*

(1) (1878) 8 Ch. D. 606, 611.

C. A. *Kinematograph Trading Co., Ltd.* (1), but was not decided.
 1931 The plaintiff may have a remedy in the nature of an action
 {
 SAMUELSON for slander of title. It is sufficient now to say that the
 v.
 PRODUCERS' remedy is not a passing-off action. Really all that has
 DISTRI- happened is that a false statement has been made, and if, as
 BUTING
 Co. is contended, no damage has resulted to the plaintiff, no action
 — would lie in respect of it. But in any case the appropriate
 form of action would not be for passing-off.

Gilbert Beyfus, for the respondent, was not called upon on this point.

LORD HANWORTH M.R. [after finding on the facts that the plaintiff was the author of "The New Car" and entitled to the copyright in it:] There were obviously potential further rights in the sketch beyond the mere producing it on the stage. The reproduction by mechanical means is referred to in the Copyright Act, 1911, which says in s. 35, sub-s. 1, that "'performance' means any representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument"; so that the film rights attach and belong to the author of the play.

It was after the Command Performance of the sketch that something occurred which has been the basis of the action. The defendants made a film, and it is quite true that the film that they produced was not a film which followed the lines of or embodied the action of "The New Car." But they sent advertisements to some trade papers, seven advertisements, I think, in all, which appeared on May 24, 26, 27 and 28, 1930, and also, I think, an advertisement which appeared on May 30 in a paper which has a weekly circulation. What these advertisements said was (I quote from the advertisement in the Cinema of Wednesday, May 28): "The man who made the Queen laugh. George Clarke in 'His First Car.' Come and see the talking version. A P.D.C. picture"—P. D. C. being the initial letters of the defendant company. There are also two passages which purport to be

excerpts from the Daily Express and the Daily Telegraph, but they are not true excerpts from those papers because they leave out the name of Laurie Wylie. They say this: "It was George Clarke in 'His First Car' who first set the fun going at high speed." It will be observed that what was really said in the newspapers was: "It was George Clarke, in Laurie Wylie's capital sketch, 'The New Car,' who first set the fun going at high speed." It is plain, however, that the intention was to refer to the sketch played by George Clarke before Their Majesties at the Command Performance; and I draw a somewhat sinister inference from the fact that these excerpts had been modified so as to make them appear to refer to "His First Car," the talkie version of a P.D.C. picture to which an attempt was therefore being made to appropriate the applause and success that "The New Car" in Mr. George Clarke's hands obtained at a Command Performance.

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When the first of those advertisements had appeared a writ was issued on May 27. [His Lordship stated the subsequent facts in regard to the proceedings, and continued:] The defendants say that the plaintiff had no right to bring a passing-off action; that there was no passing-off at all. Now what is meant by passing-off? It is said, especially by Mr. Macgillivray, that the defendants might have brought some action in the nature of slander of title, but that an action for passing-off is one where some representation is made whereby other persons are induced to believe that the goods or the production of the defendants are the goods or production of the plaintiff. In Kerly on Trade Marks, 6th ed., p. 544, "passing-off" is defined as follows: "It is an actionable wrong for the defendant to represent for trading purposes that his goods are those, or that his business is that, of the plaintiff, and it makes no difference whether the representation is effected by direct statement or by using some of the badges by which the goods of the plaintiffs are known or any badges colourably resembling these."

It appears to me quite idle to say that there was not a passing-off here. What was the purpose of what I have

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described as a moulding of the observations contained in the Daily Telegraph by leaving out Laurie Wylie and referring to "His First Car" and not "The New Car"? "His First Car" was the title of the defendants' film, and they were adducing this success as belonging to their film, "His First Car," when in truth and in fact it belonged to the plaintiff and his sketch, "The New Car." That seems to me to amount to a notice or invitation: "Come and see our film, and when you have seen our film you will have seen the sketch which has been spoken of in the manner which is stated in the passages which appear in the advertisement." It appears to me quite clear that this was an attempt to pretend that the defendants' sketch was the same as the sketch which had made Her Majesty the Queen laugh.

I, therefore, reject this contention of Mr. Morton and Mr. Macgillivray; it seems to me that the point is not maintainable. The ground on which I think the plaintiff is entitled to complain is that, he being entitled to the copyright in his sketch, including the right to its reproduction as a film, the defendants have attempted to pass off their production as a production of the plaintiff's sketch and to make use of the reputation which belonged to the plaintiff's sketch in favour of their production. It was therefore right for the plaintiff to bring a passing-off action. [His Lordship then proceeded to hold that the damages recoverable by the plaintiff, though not merely nominal, would not exceed the sum of 5*l.* paid into Court by the defendants, but that, notwithstanding this payment in, the plaintiff was entitled to proceed and bring the action on for trial because, until the trial, the defendants did not give an absolute undertaking not to repeat the offence.]

LAWRENCE L.J. [after coming to the same conclusion as Lord Hanworth M.R. on the issues not the subject of this report:] There remains one contention of the appellants upon which I desire to say a few words. It is said that what the appellants did was not "passing-off" and that therefore the action ought to have been dismissed. The argument

was that, as the plaintiff had not yet made a film version of his sketch and therefore had no goods in respect of which the defendants could have represented their goods to be his, their acts would not be termed "passing-off." In my judgment that argument is not well founded. The plaintiff and his licensees had the exclusive right of making a film version of the sketch, and the defendant company, in effect, stated in their advertisement that their production was a film version of the plaintiff's sketch, thereby misleading the public concerned into the belief that the defendants' production was a production which the plaintiff alone could in fact have produced, in other words, that it was the plaintiff's production. To put it in plain language, they were passing-off their film production as being a film production of the plaintiff's sketch. It may be that the phrase "passing-off action" has acquired a technical signification, and postulates that the plaintiff is actually marketing some goods and that the defendant is passing-off his own goods as and for the goods so marketed by the plaintiff; but, as pointed out by Romer L.J. in the course of the argument, an injunction in what is technically known as a "passing-off action" is only one of the remedies granted by a Court of equity with a view to protecting the plaintiff's property from irreparable damage. In my judgment the present case is essentially one in which the rights of the plaintiff ought to be protected. If the plaintiff had stood by, his exclusive right to make a film version of his sketch would have been rendered valueless, and he was not bound to wait until that damage to his property, which in all probability would have been irreparable, had accrued before bringing his action. In the circumstances I think that he was amply justified in bringing the action, and that the contention to the contrary on the ground that it was not a "passing-off action" fails.

ROMER L.J. I agree with all that has fallen from the Master of the Rolls and Lawrence L.J.; but, in deference to the admirable argument of Mr. Morton, I should like to say a few words for myself. [His Lordship then decided on the

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facts that the plaintiff was entitled to the copyright in the sketch, "The New Car," as the author, and continued:] The next question that arises is whether, by reason of the advertisements that were inserted on behalf of the defendants in the trade papers in May, 1930, the plaintiff acquired any cause of action against the defendants. It is said that there has been no passing-off. It is true there has been no passing-off in fact, or indeed, perhaps, threatened, in the sense in which the word "passing-off" is used in what are popularly known as passing-off actions; that is to say, the defendants have never contended that the film which they were producing or going to produce was a film prepared or made by or on behalf of the plaintiff. But the cases in which the Court has restrained passing-off in the popular and usual sense, are merely instances of the application by the Court of a much wider principle, the principle being that the Court will always interfere by injunction to restrain irreparable injury being done to the plaintiff's property. In the present case, if, as we hold to be the case, the plaintiff was entitled to his copyright in "The New Car," he was, by virtue of the Copyright Act, entitled to the sole right of producing the sketch in film form. That was an item of his property, and how it can be said that these advertisements might not cause irreparable damage to that property of the plaintiff passes my comprehension. [His Lordship then dealt with the remaining issues not the subject of this report, and expressed his agreement with the judgments of the other members of the Court.]

Order varied.

Solicitors: *Cardew Smith & Ross; Judge, Hackman, Meyer & Judge.*

H. C. G.

ATTORNEY-GENERAL *v.* WEEKS.

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[1930. A. 3172.]

1931

Oct. 28, 29.

Dentist—"Dentist 1921"—No Degree or Diploma—Use of Title "Dental Surgeon"—Implication—Professional Status or Qualification—*Dentists Act, 1878* (41 & 42 Vict. c. 33), ss. 3, 5, 6—*Dentists Act, 1921* (11 & 12 Geo. 5, c. 21), ss. 3, 4.

A dentist without degree or diploma, admitted to the dentists register under the *Dentists Act, 1921*, s. 3, sub-s. 1 (a), in virtue of pre-1921 practice of dentistry, is forbidden by s. 4 (b) of that Act to call himself a "dental surgeon," since the use of that description is reasonably calculated to suggest that he possesses the professional status or qualification of a dentist registered before that Act under the *Dentists Act, 1878*, who must be either a dentist with a degree or diploma or a dentist without degree or diploma registered in virtue of pre-1878 practice of dentistry or dental surgery.

Decision of Farwell J. [1931] 2 Ch. 348 affirmed.

APPEAL from a decision of Farwell J. (1)

The defendant was a dentist at Norwich. He was admitted to the *Dentists Register, 1878*, under s. 3, sub-s. 1 (a), of the *Dentists Act, 1921*, in virtue of his previous practice, and was registered as "Dentist 1921." He then became entitled under s. 4 to use the description of "dentist or dental practitioner" but not to use "any title or description reasonably calculated to suggest that he possesses any professional status or qualification other than a professional status or qualification which he in fact possesses and which is indicated by particulars entered in the register in respect of him."

The defendant used the title "dental surgeon" and claimed the right to do so.

On November 27, 1930, the Attorney-General at the relation of the British Dental Association commenced this action for a declaration that the defendant was not entitled to use the title "dental surgeon" and for an injunction and costs.

Before the *Dentists Act, 1878*, any one could practise dentistry under any description he chose. That Act was passed on July 22, 1878, to make provision "for the registration of persons specially qualified to practise as dentists in the United Kingdom."

(1) [1931] 2 Ch. 348.

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Sect. 3 provides that from and after August 1, 1879, “a person shall not be entitled to take or use the name or title of ‘dentist’ (either alone or in combination with any other word or words), or of ‘dental practitioner,’ or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.”

Sect. 5 provides that a person registered under this Act shall be entitled to practise “dentistry and dental surgery” in any part of Her Majesty’s dominions, and that from and after August 1, 1879, “a person shall not be entitled to recover any fee or charge, in any court, for the performance of any dental operation or for any dental attendance or advice, unless he is registered under this Act or is a legally qualified medical practitioner.”

The “qualification necessary for registration” is contained in s. 6, which provides that “any person who—

(a) Is a licentiate in dental surgery or dentistry of any of the medical authorities ; or,

(b) Is entitled as hereinafter mentioned to be registered as a foreign or colonial dentist ; or,

(c) Is at the passing of this Act bona fide engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy,

shall be entitled to be registered under this Act.”

Sect. 11 provides for the keeping of a register by the general registrar to be styled the dentists register and to contain a list of all United Kingdom dentists registered under the Act.

After the passing of this Act there still continued to be many unregistered practitioners, and the Dentists Act, 1921, was passed to prohibit unregistered practitioners from practising at all, but it contained provisions for admitting existing unregistered practitioners complying with the provisions in s. 3 to this register.

Sect. 1 provides that no person shall, unless registered in the dentists register under the 1878 Act (the principal Act), “practise or hold himself out, whether directly or by

implication, as practising or as being prepared to practise dentistry," under a penalty for so doing. This section comes into operation at the expiration of one year from July 28, 1921, extendible to two years by Order in Council.

Sect. 3 entitled certain persons to be admitted to the register, although they had no degree or diploma.

Sect. 4 provides that "a person registered under the principal Act—

(a) shall, by virtue of being so registered, be entitled to take and use the description of dentist or dental practitioner ;

(b) shall not take or use, or affix to or use in connection with his premises, any title or description reasonably calculated to suggest that he possesses any professional status or qualification other than a professional status or qualification which he in fact possesses and which is indicated by particulars entered in the register in respect of him."

Sect. 7 gave the Dental Board power to make regulations as to the form and keeping of the register.

In accordance with regulations made under s. 7 (St. R. & O., 1923, Nos. 1615, 1616, 1617, p. 211 ; 1925, No. 649, p. 235 ; 1926, No. 799, p. 369) the register contained the name and address of the person registered, the date of registration, and in the last column "Description and date of qualification." In this column the degree or diploma, if any, was stated. Persons without a degree or diploma, admitted under the 1878 Act, s. 6 (c), were entered as "dentist in practice on July 22, 1878," but under the regulations of the Dental Board any person registered under s. 6 (c) might have the entry "Dentist 1878" substituted, and similar persons like the defendant, admitted under the 1921 Act, s. 3, sub-s. 1 (a), were entered as "Dentist 1921."

The evidence given at the hearing established that the description "dental surgeon" was used before 1921 by persons registered under the Dentists Act, 1878, but that, apart from the defendant and one man in Scotland and a few in Ireland, no one of the 6858 persons registered under the Act of 1921 did so.

At the trial the plaintiff called professional witnesses, who stated that to them the term "dental surgeon" prima facie

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C. A. meant a man with a degree or diploma, though it also
1931 included a pre-1878 man. For the defendant witnesses
ATTORNEY- without special knowledge were called, who stated that to
GENERAL them the term "dental surgeon" was the same as "dentist"
v. and did not suggest any degree or diploma, and that a man
WEEKS. would make use of a degree or diploma as a matter of course,
if he possessed one.

Farwell J. said that the question depended on the true meaning and construction of s. 4 of the Act of 1921. The defendant rightly said that the 1878 and 1921 Acts must be read together, and called attention to the use of the term "dentistry or dental surgery" in many places in the 1878 Act. He contended that a dentist did in fact carry on dental surgery as part of his profession, and, if so, that he should be entitled to describe himself as "dental surgeon," unless the 1921 Act in terms prohibited it. The question, however, was whether the use of the term was reasonably calculated to suggest that the person so described possessed a professional status or qualification other than one he in fact possessed. Up to 1921 only one class of persons were entitled to be styled dental "surgeons"—namely, persons registered under the 1878 Act, either in virtue of a degree or diploma or in virtue of previous practice. It followed that when the 1921 Act permitted another class of persons to be registered, the use by a member of that class of the description "dental surgeon" was reasonably calculated to suggest that he possessed a professional status or qualification other than that which he in fact possessed. If that was the true view then, quite apart from the evidence, there was an end of the matter.

If, however, it was necessary to determine the case on the evidence, the proper inference would be that to many people in the country the term "dental surgeon" had no particular significance, but that to a more instructed body it implied a person either with a degree, licence or diploma, or registered by virtue of practice before 1878. In these circumstances it was impossible to say that the use of the title "dental surgeon" would not reasonably suggest to a considerable number of the public that the defendant

had some status or qualification which he did not in fact possess.

The defendant appealed.

Grant K.C. and *J. R. Butterfield* for the appellant. The use of the description "dental surgeon" is not reasonably calculated to suggest that the defendant possesses a status or qualification which he does not in fact possess. The suggestion originally made was that the description "dental surgeon" involved the possession of a degree or diploma, but it is clear from the evidence that it was also used before 1921 by persons who had been admitted to the register created under the Dentists Act, 1878, as being persons who had been "bona fide engaged in the practice of dentistry or dental surgery" before the Act was passed. These were admittedly persons without degrees or diplomas. It follows that the use of the description "dental surgeon" does not suggest the possession of a degree or diploma. Further, it is clear that the defendant does practise dental surgery, and, if so, it seems reasonable that he should call himself a dental surgeon. It is really a question of what the expression means in common parlance, and, just as the description doctor is freely used to describe persons who have not obtained the M.D., so dental surgeon does not suggest to the ordinary man in the street the possession of any special status or qualification. The plaintiff has failed to discharge the burden of proving that the description of dental surgeon is only used by those possessing degrees, and "dental surgeon" merely describes a person registered under the Acts practising dentistry and dental surgery. It is the usual practice of dentists possessing degrees to show them by the appropriate letters after their name.

Farwell J. held that it was only persons registered under the 1878 Act who called themselves "dental surgeons," but there is nothing in the evidence to establish this. Under s. 3 of the Act of 1878 an unregistered dentist could not call himself a dentist or dental practitioner, or any title suggesting that he is on the register or possessed of qualifications

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C. A. entitling him to be registered: *Bellerby v. Heyworth*. (1)
1931 The plaintiff sought to support his case by calling medical
ATTORNEY- and other witnesses possessed of special information as to
GENERAL dentistry, but the real question is what "dental surgeon"
v. means to the "man in the street," and the defendant's
WEEKS. evidence makes it clear that it does not suggest the possession
of any particular status or qualification but merely that
the person using it practises dental surgery.

[LAWRENCE L.J. Is not the real test what the words mean to the instructed person?]

It is submitted not. The description "dental surgeon" could before 1921 be used by an unregistered practitioner and, if so, its use cannot suggest the possession of any special status or qualification.

Gavin Simonds K.C. and *H. G. Robertson* for the respondent were not called upon.

LORD HANWORTH M.R. This action is brought by His Majesty's Attorney-General, on the relation of the British Dental Association, against the defendant, Mr. Wilfred Henry Weeks, for the purpose of obtaining a declaration that the use by the defendant of the title or description of "dental surgeon" is reasonably calculated to suggest that he possesses a professional status or qualification which he does not in fact possess, and which is not indicated by the particulars entered in the dentists register kept under the Dentists Acts, 1878 to 1923, in respect of him; and an injunction restraining him from continuing that user as being contrary to s. 4 of the Dentists Act, 1921.

The British Dental Association was formed for the purpose of safeguarding and interesting itself in the promotion of dental and allied science and the maintenance of the honour and interests of the dental profession. There is no question but that the defendant does make use of the title "dental surgeon." Mr. Weeks first began to practise dentistry about 1905, so that he has been a dentist for a considerable time. In 1928 correspondence took place on behalf of the British

Dental Association with Mr. Weeks as to his use of the title "dental surgeon," and the writ in this action was issued on November 27, 1930, to test whether Mr. Weeks has the right to continue to use this title. Mr. Weeks, who shares a view doubtless held by a certain number of other persons who use the same style, is resisting the action in defence of what he would consider to be, if not his rights, at any rate his freedom and liberty to use the title under the circumstances. We have heard a careful argument by Mr. Grant, and we have also read the judgment of Farwell J. ; and, speaking for myself, I should be prepared to leave the matter where the judgment of Farwell J. has left it, because I agree with his reasoning and his conclusions. But in deference to the argument presented to us by Mr. Grant, I desire to add a few words in order to supplement the judgment of Farwell J.

We are told that the history of the matter is as follows : Before the Act of 1878, persons were able to practise dentistry without control. The Dentists Act, 1878, was passed for the purpose of bringing some sort of method and system into the practice and qualifications of dentists. Sect. 6 of the Act provides : " Any person who : (a) Is a licentiate in dental surgery or dentistry of any of the medical authorities ; or, (b) Is entitled as hereinafter mentioned to be registered as a foreign or colonial dentist ; or, (c) Is at the passing of this Act bona fide engaged in the practice of dentistry or dental surgery, either separately or in conjunction with the practice of medicine, surgery, or pharmacy, shall be entitled to be registered under this Act." It will be at once noticed that the persons referred to in (c) are those who are practising dentistry or dental surgery. Sect. 3 imposes a penalty on unregistered persons using the title of dentists, etc. It provides : " A person shall not be entitled to take or use the name or title of ' dentist ' (either alone or in combination with any other word or words), or of ' dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act." That section, therefore, gives those registered

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C. A. under the Act a recognized position or status, and prevents
 1931 other persons pretending that they are registered, when in
 ATTORNEY- fact they are not. Sect. 4 makes it an offence for a person
 GENERAL to take a name or title which he does not possess. It will be
 v. observed, therefore, from the collocation of ss. 3, 4 and 6,
 WEEKS. that a limitation or restriction is imposed to prevent a person
 Lord Hanworth using a name, title or description implying something as to his
 M.R. position or qualification which is not in fact true.

There were a number of persons who were, on the passing of that Act, bona fide engaged in the practice of dentistry or dental surgery, and they were entitled to be registered under s. 6 (c). At the outset the relation between the number of those who were practising without a special degree and the number of those on the register was as nine to two. But, when once the Act had been passed, there was a stimulus given to the obtaining of a degree, and the result was that as time went on a great reduction took place in the number of those who were qualified to be on the register merely as bona fide practitioners under s. 6 (c) of the Act of 1878, and a great increase in the number of those on the register who had a degree or diploma; so that by 1921 there were on the register 4527 persons practising dentistry with degrees and something like 428 persons left of the pre-1878 practitioners.

It is obvious, therefore, that the situation had much changed in the passing of the forty-three years which had elapsed since 1878. The body of dental practitioners had by this time become composed very largely of persons holding a degree, and there is good reason for a very different attitude being taken in 1921 on the matter of title and status from that taken forty years before. In the Act of 1878 the expressions "dental surgery" and "dentistry" are both used. The Act of 1921 is to be read with the Act of 1878, and indeed the latter Act is called the principal Act. Therefore, putting the two Acts side by side and remembering that "dental surgery" is an expression employed in the principal Act, I turn to see how this matter of the use of titles and descriptions is dealt with and modified in the later

Act. Sect. 4 deals with that and provides: "A person registered under the principal Act"—that includes the persons who were registered as being engaged in the practice of dentistry or dental surgery—" (a) shall, by virtue of being so registered be entitled to take and use the description," not of dental surgeon (you do not find dental surgery referred to), but "of dentist or dental practitioner." That is the affirmative provision in the section, and it is important to notice that the description "dental surgeon," which was then well known and admittedly used largely, is not specified. Then we come to the negative clause: "A person registered under the principal Act—. . . (b) shall not take or use, or affix to or use in connection with his premises, any title or description reasonably calculated to suggest that he possesses any professional status or qualification other than a professional status or qualification which he in fact possesses and which is indicated by particulars entered in the register in respect of him." Mr. Grant candidly admitted that that clause goes beyond any prohibitive words to be found in the earlier Act of 1878, and it would seem at first sight that its purpose was to bring the practice or custom under the Act into accord with what had become the custom and practice of dental practitioners themselves. Those who practised dentistry and had acquired a degree or licentiate in dentistry had become much the larger body of dentists on the register, and there was, no doubt, a demand on the part of these dentists for protection, and so it is provided that, although a practising dentist not possessing such a qualification is entitled to describe himself as a dentist or a dental practitioner, he is not to pretend, by the use of some other word, that he has a professional status or qualification which he does not possess.

Here we get to the crux of the case. Mr. Grant says that the defendant was entitled to call himself a dental surgeon, just as a great number of persons had called themselves dental surgeons before 1878, and after 1878, when they had become registered. But as I am pointing out, s. 4 does decrease the liberty of dentists going on the register by

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imposing an express prohibition against using any description reasonably calculated to suggest that the user has some qualification he does not possess. And the word "surgeon" is well known as indicating a qualification. The only answer to that is that it is not reasonably calculated to suggest that the defendant possesses a professional status or qualification other than the professional status which he in fact possesses. At that point it becomes necessary to examine the evidence given before the learned judge, and I think the summary of that evidence by the learned judge is both fair and complete. "I must take it as a whole, and taking it as a whole, taking what the various witnesses thought themselves, I think the proper inference to be drawn is that while to a great many people in this country the words 'dental surgeon' do not mean anything in particular, to a considerable number of persons, on the other hand, they have a particular meaning and mean a person having either obtained a degree, licentiate or diploma or a person who was in practice in 1878. If that be so, can I say that a description which is calculated to suggest that the bearer of it possesses a professional status or qualification which he does not possess is not an infringement of this section of the Act merely because to certain members of the public it does not make that suggestion, although to other members of the public it does reasonably make that suggestion. It seems to me that I have to consider not only one part of the public or the other, but I have to consider whether to any considerable number of persons the user of this title is such as reasonably to suggest to them that the defendant has some qualification or status which he does not in fact possess."

I desire to accept those words, and I think it is a fair summary of the evidence and a suitable use of the evidence before the learned judge. Can it be said that before you can hold that the description is reasonably calculated to suggest the possession of a qualification you must hear evidence from the whole world, or that you must confine yourself to the opinion of the man in the street, or, as Bowen L.J. used to call him, the man on the Clapham bus, and find out

what he thinks about it? After all, although there may be many of them, they do not constitute the whole public, and we must not leave out of sight persons who have had perhaps a better education; and I think myself that "reasonably calculated" must mean reasonably calculated to persons who are qualified to exercise reason upon the subject, and that does not exclude, but rather includes and lays emphasis on, those who are instructed and educated persons in touch with and having some knowledge of the profession. This seems wise and right, for it will often be to those persons that reference will be made for the purpose of obtaining a recommendation of a dentist, either for a public institution or for private practice; and it may well be most important that they should have the means of knowing the qualification of dentists. It follows that it is their opinion, rather than that of a man who does not care about the matter one way or the other, that should be the touchstone for the section. In these circumstances, there was evidence which, as the learned judge has rightly held, showed that the use of the words "dental surgeon" were reasonably calculated to suggest a qualification other than one which in fact the defendant possessed.

If and so far as it is a question of law, it is for us to determine whether or not that evidence is of such a nature and quality as to satisfy the words "reasonably calculated to suggest." I have no doubt that the evidence laid before the learned judge was of that nature, and did justify the conclusion that in fact, as well as in law, the description of "dental surgeon" was calculated to suggest that Mr. Weeks possessed a professional status or qualification not in fact possessed by him.

For these reasons, it appears to me that the learned judge was right in the conclusion that he came to, and the appeal must be dismissed with costs.

LAWRENCE L.J. I agree, and have very little to add to the judgments delivered by the Master of the Rolls and Farwell J. In my opinion, the question whether the title "dental surgeon" falls within the prohibition in s. 4 (b) of

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C. A. the Dentists Act, 1921, is a mixed question of fact and law.
1931 The questions of fact which arise are : What has been the
ATTORNEY- user of the title in the past ? And what meaning, owing to
GENERAL such user, has it acquired ? The question of law is whether,
v. regard being had to the evidence on the questions of fact,
WEEKS. the title is, within the true meaning of the section, reasonably
Lawrence L.J. calculated to suggest that the user possesses a professional
status or qualification other than the status or qualification
which he in fact possesses, and which is indicated by the
particulars entered on the register.

First, as to the questions of fact, evidence was adduced on behalf of the defendant that the title in question had, for a period of upwards of fifty years before the commencement of the action, been used exclusively—I disregard the two isolated instances of the defendant and the Scotsman—by two classes of dental practitioners. The first class was composed of persons who had, by examination or otherwise, qualified themselves for and had obtained a diploma or degree in the art of dentistry. That class was small to begin with, but has steadily grown until, at the present time, it comprises about 6900 members. The second class was composed of dental practitioners who had been bona fide in practice before July 22, 1878, but had not obtained a diploma or degree. That class was large to commence with, comprising at first about 4000 members, but naturally has decreased, until at the date of the commencement of this action it contained at the most some 600 members scattered over the whole of the United Kingdom. Those facts were not really disputed by the defendant.

We then come to the further question whether, owing to such exclusive user the title “dental surgeon” has, in the minds of those qualified to judge, become identified with persons who either had obtained a diploma or degree, or had practised dentistry prior to July 22, 1878. Upon that question the plaintiff called certain witnesses who were discerning persons instructed in matters relating to the practice of dentistry, and to them the title “dental surgeon” meant persons qualified by diploma and degree, although one or

two of them admitted that it might also denote a person who had practised dentistry before July 22, 1878. On the other side, the defendant called witnesses who may be classed under two heads—namely, first, persons who were discerning and more or less instructed in matters relating to the practice of dentistry, whose evidence when closely examined did not really differ materially from that given by the plaintiff's witnesses; and, secondly, persons (described by Mr. Grant as men in the street) who knew nothing about matters relating to the practice of dentistry, and did not care whether the practitioner to whom they resorted had any and what qualification, and to whom, therefore, the title "dental surgeon" conveyed no particular meaning. Weighing the evidence on both sides, it seems to me that the weight is overwhelmingly on the plaintiffs' side, and that to the discerning and instructed person the title "dental surgeon" conveys the meaning that the practitioner using it has the status or qualification of either holding a diploma or degree or of having been in practice before July 22, 1878.

I now turn to the question whether in view of the proved facts the use of the title "dental surgeon" is reasonably calculated to suggest that the user possesses a qualification not in fact possessed by him within the true meaning of the section. The section does not state to whom the use of the title is to convey the false suggestion, but I think that it is reasonably plain that it is to the mind of the discerning and instructed person, and not to the mind of a person who neither knows nor cares what the title means. If that be the right meaning of the section, it follows that the plaintiff is entitled to succeed in this action. Mr. Grant, however, contended that this conclusion is necessarily erroneous, because most of the dentists who were in practice before July 22, 1878, had no diploma or degree, and yet according to the evidence were included in the class of persons who were entitled to use the title "dental surgeon"; consequently that the use of that title did not denote that the users possessed any professional status or qualification other than that indicated by the particulars entered on the register

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in respect of them. I do not think that this contention is well-founded. The decision in the House of Lords in *Bellerby v. Heyworth* (1) relied upon by Mr. Grant in support of his contention does not lay down that the only qualification or status intended to be referred to by the section is by diploma or degree. In my opinion a dental practitioner who was in practice on July 22, 1878, possesses a professional qualification not possessed by a dentist of 1921, and the particulars entered in the register that he was in practice on that date gives him a recognized status in his profession.

For these reasons I am of opinion that the decision of the learned judge was right and ought to be affirmed.

ROMER L.J. I agree, and I only want to add, I think, two observations.

It was held by Farwell J. that, after the passing of the Act of 1878, the only persons who were entitled to call themselves dental surgeons were persons who had registered themselves under that Act. I am inclined to agree with the learned judge on that point, and for this reason: By s. 3 of that Act no person who was not registered under the Act was entitled to "use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner.'" If, therefore, a man called himself a dentist, or surgeon dentist, or dental practitioner, that fact necessarily represented and implied that he was registered under the Act. I cannot help thinking that the use of the phrase "dental surgeon" would equally imply that the man was registered under the Act, and therefore came within the prohibition in s. 3 of the use of "any name, title, addition, or description implying that he is registered under this Act." But I do not think it is necessary to come to any final determination upon that point, and for this reason: The evidence clearly establishes that after the passing of the Act no one in fact called himself dental surgeon, with two or three negligible exceptions, other than persons who were registered under the Act and, therefore, the term "dental

(1) [1910] A. C. 377.

surgeon " has come to mean persons who possess some degree, or persons who were in practice before July, 1878.

The other observation I want to make is that in ascertaining whether the use of any particular description is or is not reasonably calculated to suggest that the user of the description possesses some professional status or qualification other than the professional status or qualification which he in fact possesses, one must bear in mind that this section was obviously enacted for the benefit and protection, not of the man who so long as he gets his tooth extracted cares not whether the extractor possesses any qualification or knowledge or status whatsoever, but for the benefit and protection of those people to whom such matters are questions of importance.

Solicitors: *Percy Robinson & Co.; Metcalfe, Hussey & Hulbert.*

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[No. 6057 of 1922.]

Company—Winding-up—Calls on B. List of Contributories—"Final call"—Proceeds of Call more than to the Liability of B. Contributories—Insufficient Assets for Payment of Creditors in full—Refund to B. Contributories of Excess over their Liability—Equal Contribution and Distribution—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 157.

Under s. 157 of the Companies Act, 1929, in the winding-up of a company, past members, or B. contributories, are liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities and the costs of winding-up, subject (*inter alia*) to the qualification that they shall not be liable in respect of any debt or liability contracted after they ceased to be members.

An insurance company, the bulk of the shares of which were only partly paid up, was ordered to be wound up by the Court. These shares being held at the date of winding-up by another company also in liquidation and insolvent, the liquidator of the insurance company made two calls, the first of 1s. a share in 1925 and the second, described as a "final call," of 1s. 6d. a share in 1927, on the B. contributories who held the shares before they had been transferred to the insolvent company. The proceeds of these calls, together with the other assets of the company, were insufficient to pay all its creditors in full, but, apart from the other assets, exceeded by some 10,000*l.* the total amount of the debts and liabilities of the company contracted at the date when the B. contributories ceased to be members of the company:—

Held, that the surplus did not form part of the assets of the company, but must be refunded to the B. contributories. The call must first be enforced against all B. contributories who had not paid it, so as to produce equality of contribution and distribution.

SUMMONS in a winding-up.

The facts were stated by Eve J. in his judgment as follows: This is a summons whereby the liquidator asks for an order that he may be at liberty to retain as part of the assets of the company available for its creditors the full proceeds of two calls of 1s. and 1s. 6d. per share made on the B. contributories, notwithstanding that such proceeds may exceed the difference between the amount of the liabilities of the company in respect of which such B. contributories are liable to contribute, and the amount available to satisfy such

liabilities out of the general assets of the company, other than the proceeds of the said two calls.

The company was incorporated on August 5, 1908, and carried on a reinsurance business, a large part of which was in respect of marine and fire insurance. Its capital was 500,000*l.* in 1*l.* shares, of which at the date of the winding-up 1601 were fully paid, and the remaining 498,399 were paid up to the extent of 6*s.* per share.

The winding-up commenced on February 3, 1922, and on the 18th of the previous July the holders—2170 in number—of 463,801 shares, paid up to the extent of 6*s.* per share had transferred them to the City Equitable Associated, Ltd., who remained the registered holders thereof at the date of the liquidation. The City Equitable and the 2170 former holders of the shares have been settled on the list of contributories in respect thereof, the former on the A. and the latter on the B. list. The City Equitable is in liquidation, and insolvent, and no more than a penny in the pound can be realized by calls on this contributory. Calls on the B. contributories referred to in the summons were made in each case after estimates had been placed before the Court of the assets and liabilities of the company, and of the probable contributions which would have to be made by the B. contributories. The liquidation has now reached a point whereat it is clear that the amount already collected from the B. contributories will substantially exceed the difference between the aggregate liabilities in respect of which they are liable to contribute, and the amount available to satisfy such liabilities out of the general assets of the company, other than the proceeds of the two calls made on the B. contributories, and the question is whether this excess, estimated to amount to 10,000*l.* and upwards, should be refunded to the B. contributories or be treated as part of the general assets, and be applied in increasing the dividend to the creditors, who in any event will not be paid 20*s.* in the pound.

The Companies Act, 1929, provides by s. 157 as follows :—

“(1.) In the event of a company being wound up, every present and past member shall be liable to contribute to

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the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of subsection (2.) of this section and the following qualifications :—

(a) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding-up ;

(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member ;

(c) a past member shall not be liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of this Act ;

(d) in the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. . . .”

Vaisey K.C. and *Harold Christie* for the liquidator. The liquidator, after making the best estimate of the liabilities possible at the time, has made a call which has realized about 10,000*l.* more than the amount of the debts for which the B. contributories are liable. But this is and was described as a final call, and the liquidator is entitled to retain any surplus to swell the general assets of the company. In any case the call has not realized anything like enough to pay the liabilities of the company in full. There would be no finality in winding-up if the liquidator had to return the excess proceeds of any call. The position alters from time to time, and the liabilities may be found to have increased, so that there may be no surplus left : *Helbert v. Banner* (1) ; *Webb v. Whiffin*. (2) The call was final in favour of the B. contributories, and it was also final against them, and the matter should not be reopened.

(1) (1871) L. R. 5 H. L. 28.

(2) (1872) L. R. 5 H. L. 711.

The system on which calls are made does not depend on the statute, but on the cases. The liquidator has called up about two-thirds of the liability of the B. contributories, and for the rest is depending on the general assets. The Act is silent as to adjusting the rights of contributories inter se until all the creditors have been paid 20s. in the pound. As long as the creditors are not fully paid the Court has no jurisdiction to order payment to any one else.

Sect. 157 of the Companies Act, 1929, amounts to a general direction that all the creditors are to receive 20s. in the pound. [They referred to ss. 206, 208 and 211 of the Act, and to *In re Blakely Ordnance Company: Brett's Case* (1), and *In re Greening & Co.: Marsh's Case*. (2)]

The House of Lords held in *Webb v. Whiffin* (3) that though B. contributories are not specifically liable to satisfy any debts contracted since they ceased to be members of the company, yet, when they have contributed to the assets, their contributions become part of the general assets and cannot be exclusively appropriated to the payment of the debts incurred before they retired.

The Companies Act does not indicate any method of taking money out of the general pool or of ordering any repayment to a contributory while creditors remain unsatisfied. There is always great uncertainty as to how much will be produced by a call on contributories, and here the liquidator received much more than he expected.

Swords K.C. and *Cecil Turner* for the B. contributories who had paid the calls. The liquidator cannot by his administration of the affairs of the company affect any legal rights. These rights depend in this case on the construction of s. 157 of the Companies Act, 1929, which, as s. 38 of the Companies Act, 1862, was construed by Lord Hatherley in *Webb v. Whiffin*. (4) The liability of the B. contributories is strictly limited to the debts contracted by the company before they ceased to be members, and if the call upon them has produced more than sufficient to satisfy those debts

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(1) (1873) L. R. 8 Ch. 800.

(2) (1871) L. R. 13 Eq. 388.

(3) L. R. 5 H. L. 711.

(4) L. R. 5 H. L. 711, 720.

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the balance must be returned. The Court has a discretion which cannot be interfered with in fixing the amount of the call: *In re Contract Corporation* (1); *Ex parte James: In re Condon.* (2)

[They were stopped by the Court.]

J. A. Reid for B. contributories who had been ordered to pay but had not paid their calls: I must resist the application so far as its object is to increase the fund to which we are not liable to contribute.

P. J. Sykes, for B. contributories who had not been ordered to pay: These contributories have declined to pay the call of 1s. 6d. per share until this question has been settled.

Cur. adv. vult.

Dec. 18. EVE J. [after stating the facts, as set out above:] I think it is clear that the moneys, subject to any deduction for costs properly chargeable to the B. contributories, must be refunded to them. Their liability to contribute is created by statute, and is restricted to so much of the amount left unpaid on their shares by their associated A. contributories as does not exceed the balance of the debts and liabilities of the Company, contracted before they respectively ceased to be members, which remains unpaid after the assets of the company and the contributions of the A. contributories have been applied *pari passu* towards the payment of all the debts of the company whenever contracted. In the present case the proceeds of the calls made on the B. contributories exceed that balance, and any dealing with the excess otherwise than by returning it to the B. contributories would operate to impose on them an increase of liability for which there is no statutory justification.

The fact that calls have been made cannot affect the statutory liability of the B. contributories. As Mr. Swords has rightly submitted, they are only the machinery by which the Court collects a fund for meeting the claims of the creditors without unnecessary delay, and so long as there

(1) (1866) L. R. 2 Ch. 95.

(2) (1874) L. R. 9 Ch. 609.

are assets undistributed in the liquidation it remains open to the Court to correct any mistakes or injustice due to falsified estimates or other unforeseen incidents arising in a prolonged and difficult administration.

Accordingly I answer the first question in the summons in the negative, and in response to the second I give the applicant liberty to enforce payment of the two calls or the unpaid balances thereof against all the B. contributories therein mentioned so far (if at all) as is necessary for the purpose of making an equal distribution of the excess proceeds of the calls made on the B. contributories amongst all the B. contributories.

The costs of all parties will be taxed as between solicitor and client, and paid out of the assets.

I might add that the order, by which the call of 1s. 6d. was made, was in terms an order for a second and final call of 1s. 6d. That would still have left something like 11s. 6d. available for calls upon the B. contributories. I do not think the order ought to have referred to the call as a final call. It remained open to the Court, if necessary, to call up more, and the liquidator might have found himself in a difficulty if after the second call it had been found necessary to call up further moneys by reason of the introduction of those words "and final." The liquidator should be able to enforce this call in order to level up as far as possible—it may not be necessary—those persons who have not paid with those who have paid, and to produce equality of contribution and make an equal distribution.

Solicitors : *Patersons, Snow & Co. ; Reid Sharman & Co.*

H. L. L.

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Dec. 2, 3.

[1931. W. 922.]

Settled Land—Lease—Under-lease—Surrender of Lease—Under-lease left Outstanding—Power of Tenant for Life to grant New Lease—Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 6—Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), s. 2—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 42, sub-s. 1—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 150.

Part of the freehold property comprised in a settlement was subject to a lease and also to an under-lease. The tenant for life under the settlement wished to take a surrender of the lease and, without having a surrender of the under-lease, to grant a new lease. On the evidence the proposed new lease reserved the best rent that could reasonably be obtained, and contained a proviso for re-entry on non-payment of the rent for twenty-one days:—

Held, that the tenant for life had power under s. 42, sub-s. 1, of the Settled Land Act, 1925, and s. 150 of the Law of Property Act, 1925, to grant the new lease although the under-lease remained outstanding. The new lease would take effect in immediate possession notwithstanding the existence of the under-lease, and would therefore comply with the provisions of s. 42, sub-s. 1, of the Settled Land Act, 1925.

In re Ford's Settled Estate (1869) L. R. 8 Eq. 309 followed.

Ecclesiastical Commissioners for England v. Tremer [1893] 1 Ch. 166 considered.

ORIGINATING SUMMONS.

Under a settlement dated February 15, 1901, the plaintiff, Hugh Richard Arthur Duke of Westminster, was tenant for life. The property comprised in the settlement included premises known as 6 Grosvenor Gardens in the county of London, which were subject to a lease by which they were demised to Robert John Waller for ninety years from September 29, 1865, at the rent thereby reserved. The lease contained a proviso for re-entry upon the rent's being unpaid for twenty-one days.

On April 10, 1928, the lessee for the time being granted an under-lease of the premises to the Secretary of State for the United States of America for seven years from July 1,

1928. The under-lease contained a proviso for re-entry upon the rent's being unpaid for twenty-one days. MAUGHAM J.

In 1930 the plaintiff desired to accept a surrender of the lease and, without taking a surrender of the under-lease, to grant a new lease for ninety years from March 25, 1930. By this summons, taken out on March 9, 1931, the plaintiff asked (*inter alia*) (*a*) whether he had power under the settlement and/or the Settled Land Act, 1925, to grant a valid and effective new lease of the premises in the form of a draft before the Court, upon having a surrender of the lease and without having a surrender of the under-lease, in reliance upon s. 150 of the Law of Property Act, 1925 (1), and (*b*) if he had not power so to do, that under s. 64 of the Settled Land Act, 1925 (2), an order might be made authorizing the grant

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(1) Sect. 150, sub-s. 1: "A lease may be surrendered with a view to the acceptance of a new lease in place thereof, without a surrender of any under-lease derived thereout."

Sub-s. 2: "A new lease may be granted and accepted, in place of any lease so surrendered, without any such surrender of an under-lease as aforesaid, and the new lease operates as if all under-leases derived out of the surrendered lease had been surrendered before the surrender of that lease was effected."

Sub-s. 3: "The lessee under the new lease and any person deriving title under him is entitled to the same rights and remedies in respect of the rent reserved by and the covenants, agreements and conditions contained in any under-lease as if the original lease had not been surrendered but was or remained vested in him."

Sub-s. 4: "Each under-lessee and any person deriving title under him is entitled to hold and enjoy the land comprised in his under-lease (subject to the payment of any rent reserved by and to the observance of the covenants agreements and conditions contained in the under-lease)

as if the lease out of which the under-lease was derived had not been surrendered."

Sub-s. 5: "The lessor granting the new lease and any person deriving title under him is entitled to the same remedies, by distress or entry in and upon the land comprised in any such under-lease for rent reserved by or for breach of any covenant, agreement or condition contained in the new lease (so far only as the rents reserved by or the covenants, agreements or conditions contained in the new lease do not exceed or impose greater burdens than those reserved by or contained in the original lease out of which the under-lease is derived) as he would have had—

(*a*) If the original lease had remained on foot; or

(*b*) If a new under-lease derived out of the new lease had been granted to the under-lessee or a person deriving title under him;

as the case may require."

(2) Sect. 64, sub-s. 1: "Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a

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of the new lease. The rent at which it was proposed to grant the new lease was 400*l.* a year which, on the evidence, was the best rent that could reasonably be obtained. The draft of the new lease before the Court contained a proviso for re-entry upon the rent's not being paid for twenty-one days.

The settlement contained powers of leasing, but they were not material to the questions before the Court.

Gavin Simonds K.C. and *F. Baden Fuller* for the plaintiff. A tenant for life exercising the powers conferred on him by the Settled Land Act, 1925, can grant a lease upon taking a surrender of an existing lease without getting in any existing under-leases. The difficulty that arises is that, if so, he would grant a lease, leaving extant an under-lease which might be on different terms, provide for a different rent, and contain different covenants from those in the new lease. A consideration of the earlier law will help in the construction of those sections of the Settled Land Act, 1925, which deal with the question. One of the earlier Acts is the Leases and Sales of Settled Estates Act, 1856. Sect. 2 of the Act (1)

transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

Sub-s. 2: "In this section 'transaction' includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing, or arrangement; but does not include an application of capital

money in payment for any improvement not authorised by this Act, or by the settlement; and 'effected' has the meaning appropriate to the particular transaction; and the references to land include references to restrictions and burdens affecting land."

(1) Sect. 2: "It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste

gives power to the Court of Chancery to authorize leases of settled estates, subject to five conditions, two of which—namely, the first, as to taking effect in possession, and the fifth, as to re-entry, must be considered in the present case, because they are repeated in later Acts. In *In re Ford's Settled Estate* (1) the question arose whether the Court could authorize the granting of a lease without the getting in of an under-lease; and it was argued that “the proposed new lease would take effect in possession within the meaning of the 2nd section of the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120),” that is, the Act of 1856, “notwithstanding the underlease, inasmuch as by 4 Geo. 2, c. 28, s. 6,” a section of an Act to which was later given the short title of the Landlord and Tenant Act, 1730, “the new lease would be as good as if the underlease had been surrendered, and the underlease would take effect out of the new lease, as if the old lease had not been surrendered”: and it was held by Malins V.-C. that the proposed new lease would take effect in possession.

It remains to consider s. 6 of the Landlord and Tenant Act, 1730 (2), s. 150 of the Law of Property Act, 1925, and s. 42,

or not, provided the following conditions be observed:

“First, every such lease shall be made to take effect in possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease twenty-one years, for a mining lease, or a lease of water, water mills, way-leaves, waterleaves, or other rights or easements, forty years, and for a building lease ninety-nine years, or where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance, to grant building leases for longer terms, then for such term as the court shall direct. . . .”

“Fifthly, every such lease shall be by deed, and the lessee shall

execute a counterpart thereof; and every such lease shall contain a condition for re-entry on non-payment of the rent for a period not less than twenty-eight days after it becomes due.”

(1) (1869) L. R. 8 Eq. 309.

(2) Sect. 6: “‘And whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants, and whereas many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewing of the principal lease by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the

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MAUGHAM sub-s. 1, of the Settled Land Act, 1925. (1) In s. 42, sub-s. 1, of the Settled Land Act, 1925, the words "to take effect in possession not less than twelve months after its date," correspond to the words "to take effect in possession at or within one year next after the making thereof" in s. 2 of the Leases and Sales of Settled Estates Act, 1856. All parties to this summons desire that the tenant for life should have the power for which the summons asks; but a difficulty is

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great prejudice of their immediate landlords, the first lessees: For preventing such inconveniencies, and for making the renewal of leases more easy for the future, Be it enacted by the authority aforesaid, that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall without a surrender of all or any the under-leases be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives or for years shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be intitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements in the respective under-leases comprised as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued, and the chief landlord and landlords shall have and be intitled to such and the same remedy by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such under-lease for the rents

and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued or as they would have had in case the respective under-leases had been renewed under such new principal lease, any law, custom, or usage to the contrary hereof notwithstanding."

(1) Sect. 42, sub-s. 1: "Save as hereinafter provided, every lease—

- (i.) shall be by deed, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;
- (ii.) shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case;
- (iii.) shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days."

created by a note to s. 42, sub-s. 1, para. (i.), in Wolstenholme and Cherry's Conveyancing Statutes, vol. ii., p. 140, which states : " It is conceived that the definition, in s. 117 (1.) (xix.), of ' possession ' is not applicable here." That definition, which applies unless the context otherwise requires, is as follows : " ' Possession ' includes receipt of rents and profits, or the right to receive the same, if any." The suggestion in the note seems to be that, in s. 42, sub-s. 1, para. (i.), " possession " does not include receipt of rents and profits, but must mean physical possession of the land. Of course that cannot be given where there is an under-lease outstanding. If, as is apparently the case, the contrast drawn by para. (i.) is between taking effect in possession not less than twelve months after its date and in reversion after an existing lease, it is difficult to see why " possession " should not there include immediate receipt of rents and profits. But in the same note it is stated : " But it may be a question whether the L. P. A., 1925, s. 150, enables a lease to be made under this s. without surrender of all underleases, except in the case of a lease for giving effect to a covenant for renewal under s. 43 (i.) *inf.* Clearly, the lease could not be so made at a higher rent or with more onerous covenants than the surrendered lease, as then there would be no remedy against the underlessee for anything more than the liability under the surrendered lease, and the condition of re-entry required by para. (iii.) of this sub-s. would not be effective." The condition of re-entry required by that paragraph is almost exactly the same as the condition of re-entry required by s. 2 of the Leases and Sales of Settled Estates Act, 1856. The position thus appears to be that, up to 1926 at least, as there is no authority between the date of *In re Ford's Settled Estate* (1) and that date, under the law as established by the Leases and Sales of Settled Estates Act, 1856, a lease could be granted under that Act, although there was an under-lease outstanding, and although the Act provided that the lease must take effect in possession and must contain a proviso for re-entry. Both those conditions were present in *In re*

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Ford's Settled Estate. (1) It appears from the records of that case that there the under-lease was of only a part of the property comprised in the lease, but the decision in that case in no way turned upon that fact. Under the old common law, although a right of physical re-entry did exist, actual entry was not necessary on an ejectment for non-payment of rent: *Goodright v. Cator*. (2) In the present case there would be in the proposed new lease a condition of re-entry which could be made effective by an action to determine the lease. The under-lessee would be in exactly the same position as if the original lease were still on foot and were being determined. His position would be unassailable. It is contended that the observations in the note on s. 42, sub-s. 1, para. i., of the Settled Land Act in Wolstenholme and Cherry's Conveyancing Statutes, vol. ii., p. 140, are not well founded. In giving effect to s. 42 of the Settled Land Act, 1925, and s. 150 of the Law of Property Act, 1925, it is not to be assumed that the Legislature intended to deprive a tenant for life who was exercising his powers of leasing of the opportunity of dealing with the land where there were under-leases outstanding which could not be got in. The Landlord and Tenant Act, 1730, had made specific reference to the difficulties which tenants for life or for long terms of years had in leasing property where there were under-leases, and was designed exactly to meet those difficulties. Sect. 42, sub-s. 1, of the Settled Land Act, 1925, and s. 150 of the Law of Property Act, 1925, must be read together, and the condition of re-entry must be subject to whatever rights there are in the under-lessee under s. 150. If, however, the submissions on the law which have been made on behalf of the plaintiff fail, the Court is asked to allow the lease to be granted under s. 64 of the Settled Land Act, 1925.

A. Grant K.C. and *W. G. Hart* for the first tenant in tail in remainder. Sect. 150 of the Law of Property Act, 1925, relates to the absolute owner, who can take any form of re-entry that he wishes and deal with the estate in any way that he chooses as between himself and his new lessee. All

(1) L. R. 8 Eq. 309.

(2) (1780) 2 Doug. 477, 484.

that that section is concerned to do is to preserve the under-lessee's rights. In the Settled Land Act, 1925, however, the matter is regarded from an entirely different point of view—namely, the benefit of the estate. A difficulty arises where there is an under-lease of the whole property at a rent of, e.g., 100*l.*, and a new head lease is created at a rent of, e.g., 200*l.* There cannot be re-entry for non-payment of this larger rent. Had the Legislature intended s. 150 of the Law of Property Act, 1925, to apply to settled land, the provisions of the section would have been repeated in the Settled Land Act, 1925. If the tenant for life granted a new lease, reserving against the new lessee a right of re-entry for non-payment of rent, he could re-enter only sub modo, because of the rights of the under-lessee. That would be re-entry under s. 150 of the Law of Property Act, 1925, but it would not be re-entry in the old legal sense. *In re Ford's Settled Estate* (1) is an authority dependent on special facts, in that the lease was a building lease of only part of the property. If the Court takes the view that s. 150 of the Law of Property Act, 1925, can be read with s. 42, sub-s. 1, of the Settled Land Act, 1925, so that the proviso for re-entry may be for re-entry sub modo, leaving the under-lease in existence, this application can be granted. If not, the proposed new lease should be sanctioned under s. 64 of the Settled Land Act, 1925.

Cleveland-Stevens K.C. and *M. G. Hewins* for the first tenant for life in remainder. The question should be decided on the authority of *In re Ford's Settled Estate* (1), which was decided over sixty years ago, appears never to have been dissented from, and is referred to without adverse comment in Carson's Real Property Statutes, 2nd ed., pp. 526, 638, 639; 3rd ed., pp. 745, 903. In *Ecclesiastical Commissioners for England v. Treemer* (2) Chitty J. dealt exhaustively with s. 6 of the Landlord and Tenant Act, 1730, the section corresponding to s. 150 of the Law of Property Act, 1925. After reading from the recital to the section, he said (3): "Then the enactments divide themselves into three parts. The first relates to the

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validity of the new lease ; the second refers to the relation between the sub-tenant and the new lessee ; and the third refers to the rights of the chief landlord as against the sub-lessee." A covenant or proviso for re-entry in the form in the new lease proposed in the present case is a strict compliance with the terms of s. 150 of the Law of Property Act, 1925, because if the rent reserved were not paid the lessor could re-enter upon the lessee and terminate his lease, and the under-lessee would not be affected.

Sir Herbert Cunliffe K.C. and *C. J. Radcliffe* for the trustees of the settlement. Possibly the Legislature, assuming that it was fully apprised of the law when the Law of Property Act, 1925, was passed, intended that, in any case in which there was not strict compliance with s. 150 of that Act, the approval of the Court to the particular form of lease which it was desired to grant should be obtained under s. 64 of the Settled Land Act, 1925.

MAUGHAM J. I have to decide whether the plaintiff, as tenant for life under the settlement or by virtue of the powers conferred by the Settled Land Act, 1925, has power to grant a valid and effective lease of a certain house in London for a term of ninety years from March 25, 1930, in the form of a draft which is now before the Court, upon having a surrender of the existing lease of the premises and without having a surrender of an existing under-lease. The question arises on the true construction of s. 42 of the Settled Land Act, 1925, taken in conjunction with s. 150 of the Law of Property Act, 1925.

According to the common law of England, it was impossible to effect the surrender of a lease to the landlord unless existing under-leases, if any, were at the same time got in or in some way terminated. That state of things was exceedingly inconvenient where some under-lessee, perhaps of a small portion of the property demised, refused (except, it might be, on the payment of a large compensation) to facilitate the transaction by surrendering his under-lease to his immediate landlord, even though he was offered a new

under-lease on exactly similar terms. I may, for example, MAUGHAM
instance the case of an under-lessee of a cottage on a large
farm refusing to allow a very beneficial contract to be carried
out : and the illustration under modern circumstances which
occurs to me is that of a lease of a block of flats where there
is perhaps one sub-tenant who is refusing to facilitate a
surrender which would in no way prejudice him.

The attention of the Legislature was called to this difficulty
as long ago as 1730, in which year was passed the Landlord
and Tenant Act, 1730 (I use the modern short title). I was
referred to that Act in the statutes at large, where, in the
recital with which s. 6 of the Act begins, I find carefully set
out the reasons for avoiding the great inconvenience which,
according to the recital, frequently came to lessors and lessees
by reason of some under-tenants being in a position to pre-
vent or delay the renewing of the principal lease by refusing
to surrender their under-leases. Accordingly, s. 6 of the
Act made provision whereby chief leases, as they were then
called, could, in the future, be renewed without the surrender
of existing under-leases, if any. Shortly stated, the effect
of the Landlord and Tenant Act, 1730, undoubtedly was to
leave untouched the rights and duties of the under-lessee,
and to place the persons to whom the new leases were granted
in the position of assignees of the reversion to the under-
lease. The result was necessarily to some extent anomalous,
and led to a rather curious position with regard to the chief
landlord's rights of re-entry and possession.

The Landlord and Tenant Act, 1730, had long been in force
when the Leases and Sales of Settled Estates Act, 1856, was
passed. That Act gave to the Court of Chancery power to
authorize leases of settled estates subject to certain conditions.
One of those conditions was that every such lease should be
made to take effect in possession at or within one year next
after the making thereof. Another was that every such lease
should contain a condition for re-entry on the non-payment
of the rent for a period of not less than twenty-eight
days after it became due : and there were other conditions
to which I need not at the moment refer.

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The question arose whether the Court had power under that Act to authorize a lease upon the surrender of an existing lease, although an under-lease granted by the surrendering lessee was unexpired ; or, in other words, whether the Court had power, under the Leases and Sales of Settled Estates Act, 1856 (relying on the provisions of the Landlord and Tenant Act, 1730), to authorize the granting of a lease leaving an existing under-lease unaffected and unsurrendered. The question came before Malins V.-C. in *In re Ford's Settled Estate*. (1) There, as in the present case, the application was unopposed. I note that Mr. Renshaw appeared for the petition and Mr. Woodroffe for the trustees. The case is reported exceedingly shortly, and the learned Vice-Chancellor, according to the report, merely decided that the proposed new lease would take effect in possession and made the order. The case has been looked up, and a slightly more elaborate statement of the order has been found in the records of the Court. The under-lease in question, it appears, was an under-lease of the ground floor of the premises. The lessee, wishing to pull down and rebuild, offered to surrender his lease, to accept a long lease at a larger rent, and to spend some money on rebuilding. The Court ordered that the conditional agreement into which the parties had entered should be carried into effect, and gave power to grant a lease for the term of eighty-four years, terminable at the option of the lessee as therein mentioned, in conformity with the Landlord and Tenant Act, 1730, and the Leases and Sales of Settled Estates Act, 1856, and subject to the provisions and restrictions therein contained.

That decision, which was of a somewhat advantageous character for the tenants for life of settled estates, appears, so far as I have been able to ascertain, in all the text-books. I think it has never been questioned or doubted, and it seems probable that a number of leases were granted pursuant to that decision before the Settled Land Act, 1882, came into force. Since that Act came into force, doubts have been entertained whether a tenant for life having the power to

(1) L. R. 8 Eq. 309.

grant leases subject to the provisions of the Settled Land Act, 1882, was empowered to grant a lease upon the surrender of an existing lease without getting in an under-lease, in reliance on the provisions of the Landlord and Tenant Act, 1730. Those doubts were expressed in a note in four editions of Wolstenholme's Conveyancing and Settled Land Acts (1), and I observe that they have been repeated in a note to s. 42, sub-s. 1, of the Settled Land Act, 1925, in Wolstenholme and Cherry's Conveyancing Statutes (which is the eleventh edition of Wolstenholme's Conveyancing and Settled Land Acts), vol. ii., p. 140. Sect. 42, sub-s. 1, provides that a lease by a tenant for life must be made to take effect in possession not later than twelve months after its date, must reserve the best rent that can reasonably be obtained, and must contain a condition of re-entry on the rent not being paid within the time therein specified, not exceeding thirty days. Having regard to those provisions, the main doubt must necessarily be whether it ought to be held upon the true construction of that section, that such a lease can be granted without the surrender of any existing under-lease. In that connection it must be borne in mind that the provisions of the Landlord and Tenant Act, 1730, have been in effect reproduced, without variation, in s. 150 of the Law of Property Act, 1925, which begins with the statement that "a lease may be surrendered with a view to the acceptance of a new lease in place thereof, without a surrender of any under-lease derived thereout." It is necessary to consider s. 150 of the Law of Property Act, 1925, carefully in order to discover the result of the transaction, the problem being, of course, the same in that respect now as it was when the Landlord and Tenant Act, 1730, was passed. It is, I think, particularly to be noted that each under-lessee "is entitled to hold and enjoy the land comprised in his under-lease (subject to the payment of any rent reserved by and to the

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(1) The note referred to is a note to s. 7, sub-s. 1, of the Settled Land Act, 1882 (now replaced by s. 42, sub-s. 1, of the Settled Land Act, 1925), in Wolstenholme's Conveyancing and Settled Land Acts, 7th ed., pp. 305, 306; 8th ed., p. 323; 9th ed., pp. 345, 346; and 10th ed., pp. 385, 386.

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observance of the covenants agreements and conditions contained in the under-lease) as if the lease out of which the under-lease was derived had not been surrendered.” That provision plainly maintains the rights of the under-lessees, provided that they comply with the obligations imposed by the under-leases under which they hold: and sub-s. 5 provides: [His Lordship read the sub-section, and continued:] In the present case, as in *In re Ford’s Settled Estate* (1), there is no active opposition to the argument put forward on behalf of the tenant for life, but I think that I have derived from counsel appearing for the other parties to the summons all the assistance which I could have obtained had there been an active opponent to the application.

It is only candid to say that real doubts arise by reason of the language used in s. 42, sub-s. 1, of the Settled Land Act, 1925. Only in a somewhat qualified sense can it be said that a lease granted while an under-lease is still on foot takes effect in possession. It can take effect in possession only sub modo, and the right of re-entry can be exercised only subject to the conditions and qualifications in s. 150 of the Law of Property Act, 1925. I have felt the weight of the arguments which have been called to my attention as being arguments which an active opponent to this application might have put forward. But I think that, in the circumstances under consideration, both the words “to take effect in possession” and the reference to the condition of re-entry can be explained. In such a case as the present it can be said, not unreasonably, that the lease is to take effect in possession, in regard to the immediate lessor, in contradistinction to a lease which is expressed to be a lease to take effect in reversion, which is the context to be found in s. 42, sub-s. 1, of the Settled Land Act, 1925. I think, also, that in such a case the reference in the same sub-section to the condition for re-entry can be construed as a reference to the right of re-entry against the immediate lessee. I would add that prima facie, in the case of contemporaneous legislation such as that of 1925, it is, I think, the duty of the Court, as

(1) L. R. 8 Eq. 309.

far as possible, to construe the legislation as intended to produce a consistent whole, and I would emphasize the fact that, in certain cases, grave injury might be done to a tenant for life of settled land, unless in granting a lease under s. 42 of the Settled Land Act, 1925, he had power to rely on s. 150 of the Law of Property Act, 1925. But, however that may be, I think that in the present case the Court is bound to place great reliance on such a decision as *In re Ford's Settled Estate* (1), pronounced and reported as long ago as 1869, and not, so far as I know, criticized in any reported case; indeed, I think that it derives some support from *Ecclesiastical Commissioners for England v. Treemer*. (2) In *In re Ford's Settled Estate* (1) the learned Vice-Chancellor must, in my opinion, be taken as having decided (although the report, which is very meagre, does not in fact so state) that a new lease granted under the Leases and Sales of Settled Estates Act, 1856, while an under-lease was still outstanding, was yet a lease taking effect in possession.

That case must be taken to have been well known at the time of the passing both of the Settled Land Act, 1882, and of the legislation of 1925. Also it is, I think, well settled, and it is to be assumed, that Parliament not only knows the Statute Law, which is obvious, but must also be taken to be aware of any judicial interpretation of words which have received judicial interpretation if the same or substantially the same words are contained in later enactments in regard to the same subject-matter. I think that I am justified in taking the view that the Legislature, in passing the legislation of 1925, was not disregarding the ancient decision in *In re Ford's Settled Estate* (1), and that, accordingly, the language in s. 42 of the Settled Land Act, 1925, referring to leases taking effect in possession and to the necessity for a condition of re-entry, was not using those words in a sense narrower than that which had been put upon them in 1869. It is to be added that the legislation of 1925 was of a remedial character and must, I think, be construed in a beneficent way. I think that I cannot decline to accede to the argument

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(2) [1893] 1 Ch. 166.

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which has been put before me unless I can hold that the judgment in *In re Ford's Settled Estate* (1) was wrong, which I should be very loth to do in a case relating to real property in reliance on which titles have been obtained, or unless I can distinguish in some way the language used in the Law of Property Act, 1925, and the Settled Land Act, 1925, from that used in the Landlord and Tenant Act, 1730, the Leases and Sales of Settled Estates Act, 1856, and the Settled Land Act, 1882. I think that I should be wrong in taking either of those courses, and I therefore hold that the plaintiff has power, under the Settled Land Act, 1925, to grant the lease in the form proposed, although the under-lease has not been surrendered.

Solicitors : *Boodle, Hatfield & Co.*

(1) L. R. 8 Eq. 309.

K. R. A. H.

*In re J. BURN.**Ex parte E. N. DE V. DAWSON, H. T. McCLELLAN, AND
THE TRUSTEE.*LUXMOORE
and
FARWELL
JJ.

1931

Nov. 23, 24,
25.

[No. 15 of 1930.]

Bankruptcy—Trustee in Bankruptcy—Creditor—Application by Trustee refused—Effect on Creditor—Appeals—Refusal by Trustee to Appeal on Creditor's Request—"Person Aggrieved"—Claim by Creditor to Appeal—Control over Trustee—Meetings of Creditors—Resolutions—Refusal by Trustee to Consider or Convene Meeting—Creditors' Rights—Wide discretionary Powers of Court—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38, sub-s. 2 (a); s. 51, sub-s. 2; s. 79, sub-ss. 1, 2 and 3; s. 95; s. 105, sub-s. 1; s. 108, sub-s. 2.

In a bankruptcy where an application has been made by the trustee under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, for the payment to the trustee out of the personal earnings of the bankrupt of such weekly sums as the Court might direct, and the application has been refused, a creditor is not entitled to appeal under s. 108, sub-s. 2, of the Act of 1914, from the refusal as being a "person aggrieved." The dicta of James and Bramwell L.JJ. in *Ex parte Sidebotham* (1880) 14 Ch. D. 458, 465, 466, as to the meaning of the expression "person aggrieved," considered and applied.

Under the Bankruptcy Act, 1914, s. 105, the Court having jurisdiction in bankruptcy has the widest possible powers. If, therefore, creditors, in pursuance of a resolution passed at a creditors' meeting, request the trustee or Official Receiver by virtue of s. 79, sub-s. 2, of the Bankruptcy Act, 1914, to summon meetings, and the trustee or Official Receiver refuse to comply with their request, the Court has ample jurisdiction to decline to order the trustee to carry out the creditors' request to convene the meeting if it considers that the holding thereof would serve no useful purpose and would only result in a useless waste of the assets in the bankruptcy. The function of the Court in such a case is not merely ministerial.

BANKRUPTCY MOTION.

On December 9, 1930, a receiving order was made on the petition of one H. T. McClellan, a creditor, against the bankrupt John Burn, a pilot by profession. The trustee in bankruptcy was duly appointed on December 30, 1930. The debt on which the petition was founded was due in respect of moneys advanced for the prosecution of certain litigation in which McClellan and another creditor, a Mr. E. N. de V.

LUXMOORE Dawson, were interested, and the petition was presented
 and because the bankrupt J. Burn had refused to appeal or join
 FARWELL JJ. in appealing from certain orders which had been made in
 1931 litigation in the Middlesex County Court to which he had
 J. BURN, been a party.
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The proceedings in the county court were three in
 E. N. DE V. number, and were instituted by a firm of solicitors, who
 DAWSON, claimed a balance due for costs incurred by them in
 H. T. certain actions in the King's Bench Division in which the
 McCLELLAN, bankrupt and McClellan were two of the defendants. By an
 AND order dated August 5, 1930, judgment was pronounced in
 THE each case in favour of the plaintiffs with costs. Application
 TRUSTEE, for a new trial having been refused, appeal was made to the
Ex parte. Divisional Court by the parties other than the bankrupt,
 which appeals were dismissed on June 5, 1931.

In the meantime the plaintiffs' costs in the county court
 action were taxed to ascertain the amount due from the
 defendants under the order of August 5, 1930. After various
 interlocutory applications to review taxation it was ultimately
 found, when taxation was completed, that, owing to moneys
 received from the defendants, the plaintiffs had moneys in
 their hands. On that an application was made on June 4,
 1931, to review the order of August 5, 1930, and by an order
 dated the same day (June 4, 1931), it was provided that the
 plaintiffs were to have the costs of the claim therein, and
 that there be judgment for the plaintiffs on their counter-
 claim. It was really a repetition of the order of August 5,
 1930. There was also a provision for taxing the costs on a
 certain scale.

Mr. E. N. de V. Dawson on the same day made an application
 to be added as a defendant in the action, which application
 was dismissed with costs. It appeared that for some
 considerable time Dawson had been the principal mover in
 a great deal of litigation which had taken place both before
 and subsequent to the bankruptcy of Burn, this litigation
 being principally in connection with certain colliery companies
 and against one or two firms of solicitors, and had been largely
 instituted by Dawson.

On January 8, 1931, a meeting of creditors was held, at which both McClellan and Dawson and the trustee were present. The principal matters discussed concerned the question of the appeal above referred to. On August 7, 1931, the trustee applied by motion, dated July 27, to the county court of Durham sitting in Sunderland for an order (inter alia) against the bankrupt to pay to the trustee such weekly or other sum as the Court might direct out of the surplus of the personal earnings of the bankrupt, after providing for himself and his family at such rate per week as the Court might determine. The county court judge declined to make the order as asked. The Official Receiver was not a party to these proceedings.

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On August 8, Dawson and McClellan served a requisition on the trustee to convene a meeting of creditors for various purposes, the main one of which was to remove the trustee himself from his office by revoking his appointment. The trustee did not act on this requisition, but on August 19 he issued a notice of motion in the county court asking the Court for a declaration that this requisition of August 8 need not be acted upon, and that McClellan and Dawson be restrained from taking any steps in the removal of the trustee without first obtaining the leave of the Court. On August 25, Dawson requested the Official Receiver to summon a similar meeting, and also to consider the conduct of the trustee in avoiding compliance with the requisition to call the meeting in accordance, as was alleged, with the Bankruptcy Act, 1914. The Official Receiver declined to accede to his request.

On October 7, 1931, Dawson himself summoned the meeting at Sunderland, at which McClellan was present. They later issued a notice of motion asking that the trustee's notice of application of August 19 be removed from the file and that the trustee and/or the Official Receiver, or both of them in conjunction, be directed to call the meeting they desired. On October 22, 1931, the county court judge in Sunderland heard three applications: the first one being by the bankrupt Burn asking for his discharge. This was opposed by the

LUXMOORE creditors Dawson and McClellan, but it was granted nevertheless, subject to a suspension for three months. The second application was by the trustee in the bankruptcy, dated as above mentioned on August 19, in which he asked the Court to excuse him from holding the meeting of creditors which had been requisitioned by Dawson and McClellan, and also that he should not act on certain resolutions passed at the creditors' meeting held on January 8, 1931.

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The third application was by Dawson and McClellan asking that the trustee's application should be taken off the file and that he should be directed to summon a meeting of creditors. The learned county court judge made the order as asked by the trustee, and dismissed the application of the creditors Dawson and McClellan.

From these orders the creditors Dawson and McClellan appealed. Dawson also appealed as a creditor from the order of the county court judge, dated August 7, 1931.

On the appeal from this latter order of August 7, 1931, arguments were heard so far as the order dealt with the refusal of the county court judge to make the order asked for by the trustee in bankruptcy above referred to, relating to the payment out of the bankrupt's earnings.

E. N. de V. Dawson, the appellant, appeared in person. He contended that as a result of the order made by the county court judge, he, as a creditor, came within the meaning of a "person aggrieved" within s. 108, sub-s. 2, of the Bankruptcy Act, 1914, and was entitled to appeal.

S. T. T. James for McClellan, who was made a respondent.

W. N. Stable for the trustee in bankruptcy. A particular creditor is not entitled to appeal from the part of the order of August 7 refusing the trustee in bankruptcy's application regarding the earnings of the bankrupt. It is for the trustee alone to apply to the Court in a matter of that kind. The original application to the county court judge was made under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, and is one only open to the trustee in bankruptcy. This prevents an appeal by a creditor in a case like this, and his only remedy

is under s. 108, sub-s. 2, as a "person aggrieved" which, it is submitted, he is not: *Ex parte Sidebotham*. (1)

Roland Burrows for the Official Receiver.

LUXMOORE J. This is an appeal by Mr. Dawson, having regard to the amendments that we have allowed in this matter, from an order of His Honour Judge Richardson dated August 7, 1931, which was made on a motion by the trustee in bankruptcy asking, first, for an order against the bankrupt to pay to the trustee such weekly or other sums as the Court might direct out of the personal earnings of the bankrupt after providing for the maintenance of himself and his family at such rate per week as the Court might direct; then the motion also asked for an order directing the bankrupt to show cause why certain proofs of debts lodged in the matter by Mr. Dawson, and by Mr. McClellan, a respondent to this motion now before me, should not be admitted by the trustee.

Mr. Dawson is appealing from the order so far as it deals with the first part of the motion, that is the part asking for an order that the bankrupt should pay part of his earnings to the trustee. There is no appeal on the second part of the motion with regard to the proof of debts, but the order of the learned county court judge does deal with another matter, that is a resolution which had been made at the meeting of the creditors.

Mr. Stable, who appears for the trustee in bankruptcy, has taken the preliminary objection that Mr. Dawson is not entitled to appeal so far as the order deals with what I call the first question, that is the payment by the bankrupt out of his future earnings. That part of the application was made under s. 51, sub-s. 2, of the Bankruptcy Act, 1914, which is as follows. (2) [His Lordship read the sub-section.] It will

(1) (1880) 14 Ch. D. 458.

(2) Bankruptcy Act, 1914, s. 51, sub-s. 2: "Where a bankrupt is in receipt of a salary or income other than as aforesaid [i.e., the specific salaries or income specified in sub-s. 1], or is entitled to any half-pay, or pension, or to any compensation granted by the Treasury, the court,

on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half-pay, pension, or compensation, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct."

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LUXMOORE be noticed there that the application is one to be made by the
 and
 FARWELL trustee. The learned county court judge has determined that
 JJ. no part of the salary or income of the bankrupt should be
 1931 applied under s. 51, and he declined to make any order for
 J. BURN, the payment by the bankrupt to the trustee of any part of
 In re. his future personal earnings as a pilot. The trustee has
 H. N. DE V. accepted that decision, and does not appeal from it in any
 DAWSON, way. Mr. Stable says that that being the case there is no
 H. T. right in any creditor in the bankruptcy to appeal. A creditor's
 McCLELLAN, right to appeal against an order is provided by s. 108, sub-s. 2,
 AND of the Bankruptcy Act, which provides that orders in
 THE bankruptcy matters shall, at the instance of any person
 TRUSTEE, aggrieved, be subject to appeal. The question therefore is
 Ex parte. whether the creditor is a "person aggrieved."

It was decided as long ago as the year 1880 in the case of
Ex parte Sidebotham (1) that the words "person aggrieved" have this meaning—I am reading from the judgment of James L.J.: "The words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." Can it be said that an order which is made refusing an application by a trustee that part of a bankrupt's future earnings shall be paid to him has done anything to the creditor to bring him within any of the classes which are referred to by James L.J. in the passage which I have just read? I do not think it is possible to say that a creditor comes within that definition. It is made even clearer I think by what was said by Bramwell L.J. in the same case where he is dealing with a question in which the comptroller in bankruptcy had made a report, and the county court judge had refused to act on the report that the trustee in bankruptcy had been guilty of misfeasance or neglect or omission, by which the estate had sustained a loss

(1) 14 Ch. D. 458, 465, 466.

which the trustee ought to make good. The bankrupt was appealing from the refusal of the county court judge to act on that report, and Bramwell L.J. said this : " Supposing that the comptroller has a right to appeal from the refusal of the judge to act upon his report, and he does not think fit to do so, is there to be an appeal by the bankrupt or by any of the creditors ? Is the comptroller to be satisfied, and yet is the bankrupt or any creditor to be entitled to appeal ? I do not say that such a state of things is impossible, but certainly the general rule is that an appeal must be by the party who has endeavoured to maintain the contrary of that which has taken place. It is not so much that there is a disability on the part of the bankrupt to appeal, as that no one but the comptroller is entitled to appeal."

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It is said, first, that the appellant, Mr. Dawson, is entitled to appeal in this matter, because he was a respondent to the motion by the trustee. He was made a respondent to that motion, not with regard to the first matter in respect of which relief was asked but with regard to that matter in respect of which he was himself personally interested, that is with regard to the proof which he had lodged in the bankruptcy. Mr. Dawson contends that he is entitled to appeal because the application was in some way made under s. 38, sub-s. 2 (a), of the Bankruptcy Act, 1914, which says that the property of the bankrupt divisible among his creditors shall comprise (among other assets) the following particulars : " (a) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." He says that because there is no limitation in the section on the right of the trustee to apply to the Court with regard to the bankrupt's property, he, as a creditor, is entitled to make an application to the Court with regard thereto.

It is plain that any application to be made to the Court under a section by a creditor would not be an application to recover any part of the property in question, but could only be to direct the trustee in bankruptcy to make such application as he thought fit. In my judgment the preliminary

LUXMOORE objection which has been taken, so far as this part of the
 and FARWELL motion is concerned, is a good objection, and Mr. Dawson,
 JJ. as appellant, is not entitled to appeal from the judgment
 1931 of the county court judge so far as it affects this matter.

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FARWELL J. I agree and have nothing to add.

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The Court having dealt with the second point in the appeal
 of Dawson relating to the order of the county court directing
 the trustee not to proceed with his application for leave to
 appeal and to disregard the resolution passed at the creditors'
 meeting held on January 8, 1931, which appeal they dismissed
 then heard the appellant on the further questions raised.

LUXMOORE J. This remainder of the motion relates
 to the appeal by Mr. Dawson from three orders, which
 are all dated October 22, 1931, and made by His Honour
 Judge Richardson, the judge of the county court of
 Durham. The first, taking them in the order in which they
 appear in the notice of appeal, was made on an application
 by the trustee in bankruptcy of one James Burn, dated
 August 19, 1931, and by this order the trustee in bankruptcy
 was directed not to act upon a requisition dated August 8,
 1931, by two creditors in the bankruptcy, the appellant,
 Mr. Dawson, and the respondent, Mr. McClellan, requiring
 the trustee in bankruptcy to call a meeting of creditors for
 the purpose of passing a resolution to remove the trustee ;
 and by the same order the trustee was also directed not to
 act on two resolutions of the creditors in the bankruptcy
 passed at a meeting held on January 8, 1931, at which the
 two creditors named were present, they at that time being
 the only creditors who had established their right to prove.
 The first of these two resolutions was to the effect that the
 conduct of certain appeals from orders of the county court of
 Middlesex, in which it was said the bankrupt and his estate
 were interested, should be committed to the respondent
 McClellan ; the second of the two resolutions was to the effect
 that the trustee in bankruptcy should reject the proof of a
 certain firm of solicitors. The county court judge made the
 order asked for by the trustee in bankruptcy.

The second order appealed from was an order made on the application of the appellant, Mr. Dawson, and the respondent, Mr. McClellan, dated October 7, 1931, and the application asked, first, that the trustee's application of August 19 and the evidence in support of it should be taken off the file; and secondly, that the trustee in bankruptcy or the Official Receiver, or both or either of them, might be ordered to issue notices forthwith summoning a meeting of creditors for certain purposes, of which the removal of the trustee was one. In substance this is the converse of the trustee in bankruptcy's application so far as it asks that the trustee in bankruptcy be directed not to act on the requisition of August 8, 1931. The learned county court judge declined to strike out the application and refused to order the meeting to be convened. So far as the first point is concerned, of course, it would be impossible to ask to take the evidence off the file when an order is asked by way of appeal from the order made by the county court judge on that application. I propose to treat the appeal from this order as asking solely for an order directing the trustee in bankruptcy and the Official Receiver, or both or either of them, to requisition a meeting of the creditors. The third order appealed from is an order of the county court judge granting the bankrupt his discharge subject to three months' suspension. If the order appealed from stands, the bankrupt's discharge will be absolute on January 22, 1932.

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Before I deal with the appeal it will be necessary to state the facts. I have gathered them with great difficulty from a perusal of affidavits and admissions of the parties and an examination of the plaint books of the Middlesex County Court, which were on our directions produced by the registrar of that Court. [His Lordship, after commenting on the nature of the evidence adduced by the appellant and the prolixity and inaccuracy of the affidavits filed by him, stated the facts as substantially set out above.]

Mr. McClellan and Mr. Dawson appear to have taken the view that owing to the form of the order of June 4, 1931, the time for appealing from the order of August 5, 1930,

LUXMOORE had been^{and} extended, and they urged the trustee in bankruptcy to appeal. Obviously the time for appealing had long since expired, and all that could be done would be to apply for leave to appeal. It is admitted that the present trustee in bankruptcy could not now obtain this leave, but Mr. Dawson and Mr. McClellan have obviously taken the view that, if the trustee in bankruptcy were removed and a trustee willing to conform to their directions were appointed, leave to appeal might be obtained. So far as I am concerned it seems unlikely that any such leave could now be granted, and more unlikely still that, if leave were granted, the appeal could have any hope of success. Consequently, it seems plain to me that no useful purpose could be served if the trustee in bankruptcy were to act in pursuance of the direction of August 8, 1931, and call a meeting of creditors.

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It has been argued by the appellant, Mr. Dawson, that there is a statutory right for creditors who fulfil the conditions laid down in the Bankruptcy Act, 1914, to insist on a meeting being called by the trustee in bankruptcy or Official Receiver, and that this right is paramount; and that if the trustee in bankruptcy or the Official Receiver refuses to call the meeting, no matter how ridiculous the object, the Court must, on the application of the creditor requisitioning the meeting, order the trustee in bankruptcy or the Official Receiver to comply with the requisition without considering any other matter at all. It is said that that follows from s. 79 of the Bankruptcy Act, 1914. Sect. 79 forms one of a group of sections headed "Control over Trustee," and it provides as follows (1): [His

(1) Bankruptcy Act, 1914, s. 79, sub-s. 1: "Subject to the provisions of this Act, the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall, in case

of conflict, be deemed to override any directions given by the committee of inspection."

Sub-s. 2: "The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes, and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, and it shall be lawful for any

Lordship read sub-ss. 1 and 2 of the section.] It is to be noticed that the section does not provide what is to happen if the trustee or the Official Receiver fails to comply with the notice. Obviously the only way to enforce compliance by the trustee or the Official Receiver is to apply to the Court having bankruptcy jurisdiction.

Now the Court has wide powers in bankruptcy. They are summed up, I think, in s. 105 of the Bankruptcy Act, 1914, which provides by sub-s. 1 as follows (1): [His Lordship read the sub-section.] It is obvious that the Court has complete control over the administration of a bankrupt's estate for the benefit of all persons interested, subject only to such express limitations as are to be found in the Act. It is admitted that if a meeting of creditors resolved on some particular course which the trustee might think would not be beneficial, the trustee has power to apply to the Court for directions with regard to it. It would indeed be strange if the Court, while having power to direct a trustee not to act on a particular resolution, had no power to direct a trustee not to call a meeting for the purpose of getting that resolution passed. I think the trustee had ample power under sub-s. 3 of s. 79 of the Bankruptcy Act, 1914, to apply to the Court for directions whether a requisition for a meeting in compliance with the requirement of the Act shall be acted on or not. Sub-s. 3 of s. 79 is in the widest general terms. It provides that "the trustee may apply to the court in manner prescribed

creditor, with the concurrence of one-sixth in value of the creditors (including himself), at any time to request the trustee or official receiver to call a meeting of the creditors, and the trustee or official receiver shall call such meeting accordingly within fourteen days:

Provided that the person at whose instance the meeting is summoned shall deposit with the trustee or the official receiver, as the case may be, a sum sufficient to pay the costs of summoning the meeting, such sum to be repaid to him out of the estate if the creditors or the court so direct."

(1) Bankruptcy Act, 1914, s. 105, sub-s. 1: "Subject to the provisions of this Act, every court having jurisdiction in bankruptcy under this Act, shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

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LUXMOORE for directions in relation to any particular matter arising
 and
 FARWELL under the bankruptcy." The question whether a meeting
 JJ. ought to be called or not must be a matter arising under the
 1931 bankruptcy, and I can find nothing in the Act to cut down
 J. BURN, the generality of this provision so as to exclude the trustee
 In re. from asking directions in respect of such a question. More-
 E. N. DE V. over it must be borne in mind that what the Court is asked
 DAWSON, to do is not to restrain the holding of the meeting, but to give
 H. T. directions to the trustee whether he should convene it or not.
 McCLELLAN, In my judgment, on the facts of this case, it is clear that no
 AND useful purpose could be effected by calling the meeting. It
 THE is plain that the object of the meeting is not really the removal
 TRUSTEE, of the trustee; its object is in some way or other to bring it
 Ex parte. about that an appeal be made from the decision of the
 — county court judge of Middlesex in the proceedings to which
 I have referred. I think the learned county court judge was
 right in directing the trustee not to hold it. It is quite true
 that one of the objects or avowed objects of the meeting was
 to remove the trustee, and no doubt the Act gives a majority
 of creditors a right to remove the trustee under an ordinary
 resolution obtained at a meeting called under s. 95 of the Act.
 But if the circumstances are such that the reason for calling
 the meeting is to attempt to obtain by the removal of the
 trustee an object which can only result in a useless expenditure
 of the assets in the bankruptcy, I am satisfied that the Court
 has ample jurisdiction to refuse to direct the trustee to call
 the meeting necessary to effect that object. It follows from
 what I have said that the appeal from the order directing the
 trustee not to act on the requisition fails. [His Lordship
 having considered the form of the order as made by the learned
 county court judge stated that in his opinion the order in
 some respects called for variation, and suggested the omission
 of certain words which he considered rendered the direction
 of the county court judge too wide.]

That leaves the second order appealed from to be dealt
 with. As I have already said, the second order appealed
 from is in substance the converse of the first in that by the
 application in which the order was made the appellant,

Mr. Dawson, and the respondent, Mr. McClellan, ask that the trustee in bankruptcy or the Official Receiver, or one or both of them, should be ordered to convene a meeting for the purpose of removing the trustee. The notice of application includes other matters which were in fact never the subject-matter of any requisition to the trustee in bankruptcy or to the Official Receiver. There were three separate requisitions. The first was on August 8. That was addressed to the trustee in bankruptcy, and it asked that the meeting should be called for four purposes: first, to remove the trustee from office; secondly, to terminate the retainer of certain solicitors; thirdly, for the appointment of a new trustee; and, fourthly, to pass any further necessary resolutions relating to or arising out of the above matters. On August 25 the appellant, Mr. Dawson, wrote to the Official Receiver asking him to call the meeting for the four purposes mentioned in the letter of August 8, and to add a further paragraph to the effect that the meeting should consider the conduct of the trustee in avoiding compliance with the requisition duly served upon him to call this meeting of the creditors as provided and directed by the Bankruptcy Act, 1914, and the statutory rules made thereunder. That letter was only signed by Mr. Dawson, and was not in compliance with the requirements of the Act. On September 14 there was a further letter from Mr. Dawson asking that the Official Receiver should require that further security should be obtained from the trustee. The actual notice of application to the Court includes a number of other matters. It is composed of three notices, to which I have referred, and additional matters are included in it some of which at any rate were not in the power of the meeting to consider at all. I am satisfied, for the reasons which I have already given, with regard to the first order appealed from, that the order of the county court judge was right in refusing to direct the meeting to be convened, and I think that the reasons I have given cover the second order. In my judgment the second order appealed from should be affirmed, and the appeal in this case should also be dismissed with costs.

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and
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Now that leaves the third order, which was the order for discharge. [His Lordship then dealt with the facts as affecting the discharge of the bankrupt and which had been fully considered by the county court judge, and came to the conclusion that there was no ground for interfering with the order, and the appeal therefore should be dismissed.]

McCLELLAN, AND THE TRUSTEE,
Ex parte.

FARWELL J. I agree and I only want to add very few words on the one question which seems to me to be of some general importance. Under the Bankruptcy Act, 1914, a creditor, if he complies with the necessary conditions laid down by the Act, may require the trustee or the Official Receiver in some cases to summon a meeting of creditors, and the trustee in bankruptcy or the Official Receiver's primary duty is to summon that meeting. If however a trustee or Official Receiver declines or neglects to summon a meeting, then the creditor undoubtedly has the right to come to this Court and to ask for an order upon the trustee in bankruptcy or Official Receiver to convene the meeting. When that application is made, is the function of this Court merely ministerial? That is to say, is its only function simply to make the order, once it is proved that the requisition was given, the conditions fulfilled, and the refusal or neglect to call the meeting; or has this Court jurisdiction to consider the circumstances of the case as a whole, including the purpose or purposes for which the meeting is called, and, if it thinks proper, to decline to make any order upon the application? The appellant here has argued that the only function of the Court is to make the order, and he says it is as it were an order of course, once the facts I have stated are proved; and that, however foolish, useless, or expensive it may be to call a meeting, this Court has no power to do anything else but order a meeting to be held.

In my judgment, that is not the true view of the Act. In my judgment, this Court's duty is, on such an application, to consider all the circumstances, including the purposes for which the meeting is to be called; and if the Court is satisfied that no useful end can possibly be served by the meeting or

for any other reason it is not right or proper that the meeting should be held, it is the duty of this Court to refuse to make any such order. In my opinion that is so even though the purpose or one of the purposes of the meeting may be to remove the trustee and to appoint a new one. It is quite true that under the Act, the creditors have the power to remove a trustee; but if the Court, when it is asked to order a meeting to be held, comes to the conclusion that that meeting ought not to be held, in my judgment it is bound to give effect to that by refusing the order, although it may by that means prevent for the time being the removal of the trustee. But I desire to add this, that speaking for myself, it seems to me that the occasions upon which the Court will refuse an order upon the trustee or Official Receiver to convene a meeting must be comparatively few. This Court does not in my judgment concern itself generally with questions of policy, which are matters for the creditors; and generally speaking if a creditor bona fide requires a meeting of creditors to be called to discuss or consider matters of general policy or questions arising with regard to some particular matter in the bankruptcy, this Court will give effect to the desire of the creditor by ordering the meeting to be held. But if the Court is once satisfied that the holding of a meeting will be useless and lead to quite useless expense and wasting of the assets, then in my judgment, in such a case as that, the Court ought to refuse to make the order. I have no doubt in this case that no useful end can be served by holding this meeting, and, if the meeting were to be held, the only possible result would be that some of these assets would be wasted in a fruitless endeavour to appeal against an order which in my judgment would inevitably fail.

Under those circumstances, if I had been the county court judge, I should have considered it my duty to refuse to make the order, and I think he came to the right conclusion when he took that course and did refuse to order the trustee or Official Receiver to convene the meeting. On the rest of the case, I agree with what Luxmoore J. has said, and I

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LUXMOORE have nothing to add. In the result, the appeal will be
and
FARWELL dismissed with costs.

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Solicitors: *J. Addis & Co.; Maude & Tunnicliffe, for
J. Tindell Green, Sunderland; Solicitor to the Board of*

E. N. DE V. *Trade.*

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AND
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In re HALL.

1931

Dec. 10.

HALL *v.* HALL.

[1931. H. 3176.]

*Will—Codicil—Construction—Direction to divide Part of Residue between
“Grandchildren of any degree”—Meaning of “Grandchildren.”*

By his will a testator disposed of two equal fourth parts of his residue (in the will called “the residuary trust fund”) as therein mentioned, and directed his trustees, after the death of one of his daughters, whom he named, and her husband, and subject to or in default of any exercise of a general power of appointment by her, to hold another equal fourth part “in trust as to the capital and income for all my grandchildren who may be living at the time in equal shares.” By the second of two codicils he directed that his trustees, at the death of the survivor of his son J. and J.’s wife, should divide the amount of the remaining fourth part “into as many parts as there may be grandchildren of any degree of mine then living, and give to each one a part, part and part alike.” The testator had five children. One predeceased him without leaving issue her surviving. All of the remaining four married, three having issue of their marriages. J. predeceased his wife, there having been no issue of the marriage. At the date of the death of J.’s wife, there were living lawful grandchildren, great-grandchildren and great-great-grandchildren of the testator. By this summons the trustee of the will and codicils asked (*inter alia*) whether, on the true construction thereof, the words “grandchildren of any degree of mine then living” included lawful grandchildren and remoter descendants of the testator living at the death of J.’s widow. There was evidence that a great-grandchild

of the testator was shown to him at a date before the execution of the MAUGHAM
codicils :— J.

Held, that the words "grandchildren of any degree" included all 1931
the testator's lawful descendants, save his children, living at the date
mentioned in the second codicil. HALL,
In re.

Hussey v. Dillon (1763) 2 Amb. 603, and *Earl of Orford v. Churchill*
(1814) 3 V. & B. 59, considered and applied. HALL
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ORIGINATING SUMMONS.

By his will dated January 21, 1897, Charlton Felix Visinier Robert Hall (hereinafter called "the testator"), after appointing executors and trustees thereof and giving a legacy and making certain specific gifts, gave the residue of his estate to his trustees upon trust to realize the same and, after payment of his debts and funeral and testamentary expenses, upon trust to hold the proceeds of realization (thereinafter and hereinafter called "the residuary trust fund") upon the trusts thereinafter declared concerning the same, and after disposing of two equal fourth parts of the residuary trust fund as therein provided, he disposed of another equal fourth part as follows : "I direct that the said trustees or trustee shall invest in their or his names or name another equal fourth part of the said residuary trust fund in any of the modes of investment hereinafter specified and shall pay the income of such investments to my daughter Margaret Aicken during her life and after her death shall hold the investments in trust for such persons or person and if more than one in such shares as she shall by will or codicil appoint and in default of any such appointment and so far as any such appointment shall not extend in trust to pay the income thereof to her present husband during his life if he shall survive her and subject thereto at his death in trust as to the capital and income for all my grandchildren who may be living at the time in equal shares."

The testator then gave a life interest in the remaining equal fourth part of the residuary trust fund to his son John Hall, and made certain other dispositions in regard to this share of the residuary trust fund, which were revoked by one of two codicils, both dated October 21, 1899 (hereinafter called "the second codicil"). The second codicil continued : "Taking counsel with myself I now determine and hereby

MAUGHAM direct my trustees after the death of my said son John Hall J.
 1931 to pay to Ellen (née Hamilton) his present wife should she
 { survive him one half the amount they had paid to him during
 HALL, her natural life. At his death, in the event of her not surviving
In re. him, or, should she survive him, then at her death, I hereby
 HALL direct my trustees to divide the amount of the said fourth
v. part of the said residuary trust fund, together with accumu-
 HALL. lations of interest, if any, into as many parts as there may be
 — grandchildren of any degree of mine then living and give to
 each one a part, part and part alike and take receipt, which
 receipts shall be their discharge."

The testator died on March 7, 1901, having had five children, of whom all survived him save one, who predeceased him without leaving issue her surviving. Of the remaining four, all were married, and there was issue of each marriage save that of John Hall. John Hall died on January 1, 1925, and his widow Ellen Hall on June 5, 1931. At the date of her death there were living many grandchildren and great-grandchildren and three great-great-grandchildren of the testator. John Hall was believed to have had an illegitimate daughter, but it was not known whether she had survived Ellen Hall or not.

On November 19, 1931, this summons was taken out on behalf of the sole trustee of the testator's will and codicils for the determination (inter alia) of the question whether, on the true construction of the will and codicils, the words "grandchildren of any degree of mine then living," included lawful grandchildren and remoter descendants of the testator living at the date of the death of Ellen Hall.

Hugh Gamon for the summons.

W. Lyon Blease for a grandchild of the testator. All English dictionaries seem to indicate that the correct view is that the word "grandchild" can refer to one generation only, i.e., that it can include only the child of a son or a daughter.

Stafford Crossman for a great-grandchild of the testator. In *Earl of Orford v. Churchill* (1) it was held that
 (1) 3 V. & B. 59.

“grandchildren” did not comprehend great-grandchildren; but in *Hussey v. Dillon* (1) it was held that, in the circumstances of the case, great-grandchildren took under a devise to grandchildren. The Oxford Dictionary gives thirteen meanings of “degree,” and the only meanings which could possibly be relevant here are the third and the fourth. The third is “a ‘step’ in direct line of descent; in *pl.* the number of such steps, upward or downward, or both upward to a common ancestor and downward from him, determining the proximity of blood of collateral descendants.” The fourth is “a stage or position in the scale of dignity or rank; relative social or official rank, grade, order, estate, or station.” The third is the meaning which applies in the present case. As the phrase “grandchildren of any degree” is ambiguous, evidence of surrounding circumstances may be admitted for the purpose of trying to discover the meaning of it. There is evidence that, a few days before the execution of these codicils by the testator, a great-grandchild of his was brought to see him. That evidence is admissible as showing what might have been in his mind when he used the words “grandchildren of any degree.”

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MAUGHAM J. In this case I have to decide what is the right meaning to be put upon the words “grandchildren of any degree.” I exclude at once the possibility of their referring to illegitimate grandchildren. It is in my opinion a sound rule that in an English will the word “lawful” must be presumed to exist before such words as “children,” “grandchildren,” and “issue,” and that illegitimate persons cannot be included in a gift otherwise than nominatim or by description sufficient to identify them.

The alternatives before me are, that the phrase “grandchildren of any degree” refers to grandchildren of any stirps, i.e., to children of one of the five children of the testator, or that it refers to descendants of the testator, to be ascertained at the date mentioned in the codicil, in any of the steps of descent from the testator, using the word “degree” in the

MAUGHAM not at all uncommon meaning of a step in the direct line of descent. The word "grandchild" has a somewhat curious history, and the same observation applies to the words "grandson" and "granddaughter." A perusal of the Oxford Dictionary shows that the word "grand" is properly used, after the French example, to denote the second degree removed in ascent of relationship, as grandfather, grandmother, and so on; and is, by a false analogy (not following the French, who use the words "petit-fils" and "petite-fille"), used to denote the second degree removed in descent of relationship, as grandson, granddaughter, and so on. A number of examples are given in the dictionary, and I think that it may be said that the examples all tend to show that the words "grandson," "granddaughter," "grandchild" and "grandchildren" are generally used to indicate descendants of the second degree, i.e., children of children. It should, however, be observed that examples of that kind do not necessarily prove that the word "grandchildren" is incorrect as applied to great-grandchildren, because comparatively few persons live to associate with or to see their great-grandchildren. If, for instance, it is said that a man was out walking with his grandchildren and he has no great-grandchildren or none who could walk, the word is plainly used in its narrower sense.

There have been two references to the matter in decisions which have been reported, and a judge may perhaps express his regret that those who collaborated in the production of the Oxford Dictionary did not extend their researches to the law reports, in which they would have found much material of value. The first of the two cases is *Hussey v. Dillon* (1), in which the then Lord Chancellor, Lord Henley, said, in his judgment (2): "*Grandchildren* is a word of large extent, and, in common parlance, takes in everybody descended from the testator, and will have that effect, unless the intention appears to the contrary." I do not rely on that statement as a binding decision that the word "grandchildren" takes in everybody descended from the testator unless

(1) 2 Amb. 603.

(2) 2 Amb. 604.

anything appears to the contrary ; but at least it tends to show that at the date of the report, the year 1763, the then Lord Chancellor was of the opinion that “grandchildren” was a word of large extent and, in common parlance, took in everybody descended from the testator.

The second decision dealing with the point is *Earl of Orford v. Churchill*. (1) That was a case arising out of the construction of a will and a settlement, and it was unsuccessfully argued, inter alia, that the word “grandchildren” would comprehend great-grandchildren. In my opinion, however, the judgment is no authority for the view that in a will the word “grandchildren” with a suitable context may not properly be construed to include great-grandchildren and other descendants ; and although it is now well settled that *prima facie* the word “grandchildren” means descendants of the second degree, it is not impossible to find cases in which it is used in a wider sense. The derivation of the word, as I have pointed out, does not in any way indicate that it may not be so used.

In the present case I have to give a meaning to the words “grandchildren of any degree.” There is reason for using the word “degree” as indicating steps in a line of descent, and I am of opinion that the testator used the word “grandchildren of any degree” to indicate descendants of any degree (other than children) living at the date which he had mentioned. I think that some support for that construction is to be derived from the fact that he adds the words “and give to each one a part, part and part alike,” which tends to show that each one of those “grandchildren of any degree” was to have a part. He did not add those words in his disposition of the one-fourth of the residuary trust fund “in trust as to the capital and income for all my grandchildren who may be living at the time in equal shares.” In the case of a gift to grandchildren simpliciter there is no competition between parent and child. In the case of a gift to descendants children may compete with parents, and it may very well be that the thought of the possibility of competition of that

(1) 3 V. & B. 59.

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MAUGHAM kind led to the testator's using the curious phrase "and
J. give to each one a part, part and part alike."

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I should add that there is evidence, which is in my opinion admissible, that the testator, before executing the second codicil, containing the words in question, made the acquaintance of a great-grandchild—namely, Margaret Joyce Bromfield, the child of his granddaughter Margaret Eliza Bromfield. He had, in fact, at the date of the second codicil, two great-grandchildren.

I shall declare that the words "grandchildren of any degree" in the testator's second codicil mean all his lawful descendants (other than children) of any degree, living at the date of the death of Ellen Hall, the wife of the testator's son John Hall.

Solicitors: *Field, Lindsay & Davie, Liverpool; Weightman, Pedder & Co., Liverpool.*

K. R. A. H.

In re BARNARD.FARWELL
J.MARTINS BANK *v.* TRUSTEE.

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Nov. 16, 17,
20.

[567 of 1931.]

Bankruptcy—Two Limited Partnerships—Same Sole General Partner—Bankruptcy of both Firms—Bills accepted by Firm B.—Proof in Firm A.'s Bankruptcy—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23—Limited Partnerships Act, 1907 (7 Edw. 7, c. 24), ss. 4, 7—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 30, 127—Bankruptcy Rules, 1915, r. 286.

Barnard was the sole general partner in two limited partnerships, Firm A. and Firm B.

By May 12, 1931, five bills of exchange had been drawn on Firm B., who accepted them by Barnard as managing partner.

Receiving orders were subsequently made against both firms on Barnard's petition, and in each case Barnard was adjudicated bankrupt :—

Held, that the holders of the bills were entitled to prove in the Firm A. bankruptcy.

Observations on the correct method of administering the assets in the respective bankruptcies.

MOTION.

On October 4, 1928, a limited partnership was registered under the name of W. H. Barnard, metal broker, 24 Lime Street. The partnership term was seven years from September 25, terminable at Barnard's death. Barnard was the sole general partner, and there was one 100*l.* limited partner.

On May 17, 1929, another limited partnership was registered under the name of the Scrap Metal Company, 24 Lime Street, an accepting house conducting financial operations in connection with the business of a metal broker. The partnership term was seven years from May 14, terminable at Barnard's death. Barnard was again the sole general partner, and there were three other 100*l.* limited partners.

Between March 12 and May 12, 1931, five bills of exchange were drawn by Moss Isaacs, *Ld.*, on the Scrap Metal Company for sums amounting to 9869*l.* These were accepted by the

FARWELL J. Scrap Metal Company by Barnard as managing partner.
They were now held by Martins Bank.

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BARNARD, *In re.* On June 8, 1931, a receiving order was made against the
MARTINS BANK *v.* Barnard firm on Barnard's petition. On June 26 Barnard
TRUSTEE. was adjudicated bankrupt and a trustee appointed.

On July 24 a receiving order against the Scrap Metal Company was made on Barnard's petition. On the same day Barnard was again adjudicated bankrupt, the official receiver remaining trustee.

On October 1 Martins Bank, having withdrawn a proof in the second bankruptcy, i.e., the Scrap Metal Company's bankruptcy, lodged a proof for their 9869*l.* in the first bankruptcy, i.e., the Barnard firm bankruptcy.

On October 23 the trustee rejected this proof on the ground that "the bankrupt is not a party to the bills upon which the proof is made."

On November 16 the bank moved that this decision might be reversed and the proof admitted.

The Limited Partnerships Act, 1907, provides for the formation of limited partnerships.

By s. 4, sub-s. 2, a limited partnership must consist of "one or more persons called general partners, who shall be liable for all debts and obligations of the firm," and "one or more persons to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed."

By s. 5, every limited partnership must be registered as such under the Act.

By s. 6, sub-s. 1, a limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm: Provided that he may at any time inspect the books and examine into the state and prospects of the business and advise with the partners thereon. If he takes part in the management of the partnership business he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner.

By sub-s. 2, a limited partnership is not dissolved by the death or bankruptcy of a limited partner, and his lunacy is not a ground for dissolution unless his share cannot be otherwise ascertained and realized.

By sub-s. 3, in the event of the dissolution of a limited partnership its affairs shall be wound up by the general partners unless the Court otherwise orders.

Sub-s. 4 provided for winding up under the Companies Acts. But this sub-section was repealed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), and s. 268, sub-s. 1 (vii.), substituted. That again was repealed by the Bankruptcy Act, 1913 (3 & 4 Geo. 5, c. 34), s. 24, and under that section and s. 127 of the Bankruptcy Act, 1914, limited partnerships are now dealt with in bankruptcy.

Sub-s. 5 contains provisions as to the settlement of differences, assignment of the shares of limited partners, and so on.

By s. 7, subject to the provisions of this Act, the Partnership Act, 1890 (53 & 54 Vict. c. 39), and the rules of equity and of common law applicable to partnerships, except so far as they are inconsistent with the provisions of the last mentioned Act, shall apply to limited partnerships.

The remaining sections contain provisions as to registration and inspection of the register and so on.

Clayton K.C. and *Herbert Jacobs* for Martins Bank. Having regard to s. 23, sub-s. 2, of the Bills of Exchange Act, 1882 [set out in the judgment] Barnard, the general partner liable on the bills, was a party thereto.

Though not maturing till after the receiving order, the bills were provable under the Bankruptcy Act, 1914, s. 30, sub-ss. 3, 8 (c), and Sch. II., r. 22, which Act by s. 127 applies to limited partnerships.

The proof ought therefore to have been admitted.

That is the only question now before the Court, and any subsequent question as to the order of application of the assets in the respective bankruptcies can be argued and determined if and when it arises. It is only necessary to point out that, as there are no joint and separate estates or

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FARWELL liabilities, s. 33, sub-s. 6 [set out in the judgment] does not apply.

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Tindale Davis for the trustee. The limited partnerships are in effect separate entities. The limited partners are directly interested in their respective firms' assets : see r. 290.

Here there are in effect three bankruptcies—namely, Barnard as an individual, Barnard as general partner in the Barnard firm, and Barnard as general partner in the Scrap Metal Company firm. Those three bankruptcies ought to be separately administered, and the respective assets and liabilities kept quite distinct on the principle of s. 33, sub-s. 6, though admittedly not in terms applicable.

If that principle is adopted it does not really matter in which bankruptcy the proof is admitted.

Clayton K.C. replied.

Cur. adv. vult.

Nov. 20. FARWELL J. [after stating the facts and reading the relevant sections of the Limited Partnerships Act, 1907 :] It is well settled that an ordinary partnership is not a legal entity like a limited company, and although the Limited Partnerships Act, 1907, recognizes a limited partnership and requires it to be registered and gives liberty to inspect the register, it does not create it a legal entity. It is merely a combination of persons for the purpose of carrying on a particular trade or trades, and in no sense strictly speaking a legal entity.

The principal provision for the purpose of this motion is in s. 4, sub-s. 2, by which the liability for "all debts and obligations of the firm" is cast on the general partners. In this case Barnard, the sole general partner, is personally liable for the firm's debts. The limited partners are not so liable unless they have taken some active part in the management, which is not so here.

The result is that Barnard is now personally liable for the 9869*l.* debt to Martins Bank. It is a debt for which he alone can be made liable at law, and in my judgment it is clearly a debt provable in his bankruptcy under s. 30, sub-s. 3, of the Bankruptcy Act, 1914.

Rule 286 provides that a receiving order made against a limited partnership firm shall operate as a receiving order against each general partner. Here, therefore, the receiving order against the Barnard firm operates against Barnard alone. On that he was adjudicated a bankrupt, and I cannot see on what ground his 9869*l.* debt is not provable in his bankruptcy.

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The trustee has rejected the proof on the ground that the bankrupt is not a party to the bills. But s. 23, sub-s. 2, of the Bills of Exchange Act, 1882, provides that "the signature of the name of a firm is equivalent to the signature by the person so signing of all persons liable as partners in that firm." The firm's signature by Barnard is therefore equivalent to his own signature, he being the person liable as a partner. It is, therefore, a fallacy to say that he is not a party to the bills. He is in fact a party, and the party liable. In these circumstances the proof has been wrongly rejected, and it must be admitted in this bankruptcy.

That disposes of the motion, but I desire to say that it does not necessarily follow from the admission of the proof that the debt is payable out of the Barnard firm assets.

Sect. 127 of the Bankruptcy Act, 1914, provides that subject to such modifications as may be made by general rules, the provisions of this Act "shall apply to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners . . . being adjudged bankrupt, the assets of the limited partnership shall vest in the trustee."

Then r. 286 provides that a receiving order against the firm operates as a receiving order against each general partner. Rule 289 gives the limited partners the right to inspect the file, attend creditors' meetings, and so on.

Rule 290 provides that the assets vesting in the trustee under s. 127, include the liability (if any) of the limited partners and part general partners to contribute to the assets.

The result is that, so far as applicable, the method of administering an estate in bankruptcy in the case of an

FARWELL ordinary partnership is to be applied as far as possible in the case of a limited partnership.

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Now if the separate debts of Barnard, the individual, are payable in the first instance out of the Barnard firm assets a grave injustice might result to the limited partners. Subject to the payment of the firm's debts and liabilities out of the firm's assets, the limited partners are entitled to recover their own contributions; and if the general debts of Barnard, the individual, including his separate debts and debts incurred by him on behalf of some other limited partnership, are payable out of the Barnard firm assets, the limited partners in that firm may be seriously prejudiced.

Is there any provision in the Bankruptcy Act to avoid that result? Sect. 33, sub-s. 6, provides that in the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates, it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the separate estates in proportion to the right and interest of each partner in the joint estate.

The bank rightly points out that here there is no question of joint liability, because there is only one general partner, Barnard, who alone is liable for the debts.

But on the other hand it seems to me as at present advised that the principle underlying s. 33, sub-s. 6, ought to be applied in this case. The Barnard firm assets must first be applied in discharging the firm's debts, i.e., the debts incurred by or on behalf of that firm. The surplus must be applied in repaying the limited partners their actual contributions. The balance will form part of Barnard's separate estate, and out of that will be paid Barnard's own private debts and any other debts incurred by him on behalf of other limited partnerships.

The same thing applies *mutatis mutandis* in the case of the Scrap Metal Company. The debts proved in the bankruptcy, which have been incurred on behalf of that firm,

will be payable out of that firm's assets. The balance will be applied in the first instance in repaying the limited partners, and the surplus will be part of Barnard's separate estate available for payment of his private debts, and debts incurred by him on behalf of some other limited partnership, which for that purpose must be treated as separate debts.

That is the way in which in a case of this kind the matter must be dealt with. The method is derivable from the provisions of the Bankruptcy Act. Injustice to the limited partners will be prevented, and the assets will be dealt with in a way that is equitable between all the persons interested therein.

These observations do not of course affect my decision that the trustee has wrongly refused to admit the proof, and in the result I must make an order that the trustee's decision be reversed and the proof admitted, and the trustee must pay the bank's taxed costs. Whether in the result the bank, having regard to the view I have expressed, will get any advantage by proving in this bankruptcy rather than in the bankruptcy of the Scrap Metal Company is a question with which I am not concerned. Since the only matter which has been fully argued is as to the rejection of the proof, my decision must be confined to reversing the trustee's decision and admitting the proof, but I thought it right to make the above observations for his guidance, and to prevent him being misled by my decision. If the trustee acts upon my observations, any one who takes exception can come to the Court and get the matter finally determined.

Solicitors : *Charles Stevens & Drayton ; Linklaters & Paines.*

G. R. A.

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[1931. W. 140.]

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Nov. 13.

WARING *v.* BOOTH CRUSHED GRAVEL COMPANY,
LIMITED.

[1931. W. 139.]

*Conveyance—Reservation of “mines, minerals, and mineral substances”—
Construction—Sand and Gravel, whether included—Construction according
to Meaning in Vernacular at Date of Conveyance.*

Prima facie the meaning of the word “minerals” both in private deeds and in statutory provisions will yield to the expressed or implied intention of the parties.

In arriving at the construction of a reservation of mines and minerals in a private deed, regard must be had to cases relating to the construction of the words “mines and minerals” in statutory provisions.

The two main principles to be gathered from the authorities are: (1.) that the word “minerals” when found in a reservation out of a grant of land means substances, exceptional in use, in value and in character, and does not mean the ordinary soil of the district which, if reserved, would practically swallow up the grant, and (2.) that in deciding whether or not in a particular case exceptional substances are “minerals” the true test is what the word means in the vernacular of the mining world, the commercial world and landowners at the time of the grant and whether the particular substance came within that meaning.

The question whether a given substance is or is not a “mineral” within the meaning of the instrument in which it is mentioned is a question of fact to be decided according to the circumstances of the particular case.

For all practical purposes “minerals” and “mineral substances” are synonymous terms, and the latter yields to the expressed or implied intention of the parties as much as the former, and accordingly what is said in the authorities as to the meaning of the word “minerals” applies with equal force to the words “mineral substances.”

A conveyance of land made in 1925 contained a reservation of “all mines, minerals, and mineral substances”:—

Held, that the words must be construed according to their meaning in the vernacular of the mining world, the commercial world and landowners at the time of the execution of the conveyance, and that, upon the evidence, the words did not include sand or gravel.

Principle laid down by James L.J. in *Hext v. Gill* (1872) L. R. 7 Ch. 699, 719, and approved of by the House of Lords in *Lord Provost of Glasgow v. Farie* (1888) 13 App. Cas. 657, and *North British Ry. Co. v. Budhill Coal and Sandstone Co.* [1910] A. C. 116 applied.

Decisions of Eve J. affirmed.

APPEALS from decisions of Eve J.

The following statement of the facts is taken from the written judgment of Lord Hanworth M.R. :—

By deed of conveyance dated December 30, 1925, Lord Calthorpe, as tenant for life in possession, conveyed to Sir Holburt Jacob Waring, the plaintiff in both these actions, in fee simple, certain lands in the county of Stafford, including Booth's Farm, hereinafter more particularly referred to.

By a contract made on September 4, 1925, between the plaintiff as vendor and George Albert Barton as purchaser, the plaintiff agreed to sell to the purchaser "Booth's Farm," described as Lot 80 in the particulars and conditions of sale of the Perry Hall Estate, put up for sale on February 1, 1923, at the price of 8750*l.*, "subject to the special conditions of sale printed in those particulars and the conditions contained in the said contract."

By a deed of conveyance dated July 28, 1926, made (inter alios) between the plaintiff and George Albert Barton and the defendant, as sub-purchaser, there was conveyed to the defendant the freehold property described in the first schedule thereto, which included Booth's Farm, which was coloured pink and green on the plan annexed to the conveyance, but excepting and reserving thereout from the land coloured pink "all mines minerals and mineral substances within or under the same Together with full power and liberty for the vendor his heirs and assigns to work and get the same by underground workings only without any obligation to leave any subjacent or lateral support for the surface or any building for the time being erected thereon or any adjoining land or building and for the purpose of such workings from time to time and at all times to do all acts and things necessary or proper for working or getting such mines minerals and mineral substances and also the right to use all existing underground roadways gateways and airways lying under the said land and to drive and make additional underground roadways gateways and airways in such land not being nearer than 300 yards from the surface which may

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be deemed advisable for the purpose of working getting and developing " certain mines and minerals therein mentioned.

By a lease dated July 12, 1928, and made between the defendant and one Alfred Richards, the defendant demised to Richards the right for the term of fourteen years to get gravel and sand from some convenient part of Booth's Farm to be selected by the defendant. The benefit of that lease is now vested in the defendant company, the Booth Crushed Gravel Company, Ltd., and they are working the gravel pit upon Booth's Farm and have already carried away therefrom large quantities of gravel and sand and are continuing to do so.

The second action is brought against this company to recover damages for this alleged trespass and conversion; and the defendant company justify their action under the rights acquired by the defendant and leased by him to Richards, which rights are now vested in the defendant company. In other words, the question whether the defendants can justify their action depends upon whether the defendant Foden took the right to the sand and gravel under the conveyance of July 28, 1926, or whether they were reserved to the plaintiff vendor.

The actions were called on for determination together, the appellant agreeing that the decision of this point in the first action would determine the issue in the second—no question of figures or amounts being now raised.

Eve J., who tried the cases, decided in favour of the defendants, and from his decisions given on June 18 the plaintiff appeals.

The appeals were heard on October 20, 21, 22, 23, 1931.

Sir Leslie Scott K.C., P. Gordon Bamber and R. L. Daniell for the appellant. On the evidence gravel is not a part of the ordinary subsoil of the district, and it is included in the reservation of mines, minerals and mineral substances so far as it occurs in sufficiently large quantities to be of commercial use. The right to dig foundations for buildings does not confer a right to dig for the purpose of getting materials out

of the soil for sale: *Robinson v. Milne*. (1) The authorities relating to the construction of such words as “mines and minerals” are divisible into two classes consisting of: (1.) cases relating to the construction of a reservation in a deed, and (2.) cases under various statutes, such as the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 77, and the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 8, where there are excepted on the acquisition of land purchased for the undertaking, the “mines of coal, ironstone, slate and other minerals.” *Bell v. Wilson* (2) is one of the earliest of a series of decisions on the scope of the words “mines and minerals” in conveyances. There a reservation of “mines or seams of coal, and other mines, metals or minerals” was held to include freestone: see also *Earl of Rosse v. Wainman* (3), where the word “minerals” was held to include “all fossil bodies or matters dug out of mines.”

It is contended that the cases dealing with the construction of expressions such as “mines and minerals” in Acts of Parliament have no application to this case. Some of the earlier authorities of that class are: *Great Western Ry. Co. v. Bennett* (4); *Midland Ry. Co. v. Checkley* (5) where, however, an exception in a special canal Act of mines and minerals was held by Lord Romilly to include “everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful”; *William Dixon, Ld. v. Caledonian and Glasgow and South Western Ry. Cos.* (6); *Errington v. Metropolitan District Ry. Co.* (7), where Jessel M.R. recognized that the word “minerals” in the Railways Clauses Consolidation Act, 1845, s. 77, included beds of gravel; *Midland Ry. Co. v. Haunchwood Brick and Tile Co.* (8), where under the same section the word “mines” was held to include a bed of clay.

In *Hext v. Gill* (9) a reservation of “mines and minerals” was held to include china clay. There Mellish L.J. said that

(1) (1884) 53 L. J. (Ch.) 1070.

(2) (1866) L. R. 1 Ch. 303.

(3) (1845) 14 M. & W. 859, 872.

(4) (1867) L. R. 2 H. L. 27.

(5) (1867) L. R. 4 Eq. 19, 25.

(6) (1880) 5 App. Cas. 820, 827.

(7) (1882) 19 Ch. D. 559, 571.

(8) (1882) 20 Ch. D. 552.

(9) L. R. 7 Ch. 699, 712, 719.

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“ a reservation of ‘ minerals ’ includes every substance which can be got from underneath the surface of the earth for the purpose of profit ” ; but James L.J. suggested that “ what was meant by ‘ mines and minerals ’ in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners ” at the time of the grant. The construction placed on a reservation of minerals by Mellish L.J. received support in *Tucker v. Linger*. (1) It is true that in *Lord Provost of Glasgow v. Farie* (2), a case where the House of Lords considered the meaning of “ mines and minerals ” in the Waterworks Clauses Act, 1847, Lord Halsbury (3) adopted the test laid down by James L.J. in *Hext v. Gill* (4) and gave it as his opinion that it is a question of fact what a grant of “ mines and minerals ” included. The expression of opinion is obiter dictum, and the true view is that expressed by Mellish L.J. in *Hext v. Gill* (5), which is good law so far at any rate as regards the construction of conveyances : see too *Earl of Jersey v. Guardians of Poor of Neath Poor Law Union* (6) and *Johnstone v. Crompton & Co.* (7) Apart from Lord Halsbury’s dictum in *Farie’s* case (2) there is nothing in the cases containing the words “ mines and minerals ” in Acts of Parliament which goes contrary to the appellant’s contention here : see *Midland Ry. Co. v. Robinson*. (8)

[LAWRENCE L.J. There is a representation in the particulars of sale in this case that the land is being sold as building land, and the question arises whether the exception ought not to be construed with a limited meaning on account of this.]

So long as the purchaser got everything necessary to make building possible he could have no ground for complaint. Even in cases under the statutes, gravel worked by quarrying would be held to be included in “ mines and minerals ” :

(1) (1882) 21 Ch. D. 18, 35, 38 ;
 and in H. L. (1883) 8 App. Cas. 508,
 512.

(2) 13 App. Cas. 657.

(3) Ibid. 669.

(4) L. R. 7 Ch. 699, 719.

(5) Ibid. 712.

(6) (1889) 22 Q. B. D. 555.

(7) [1899] 2 Ch. 190.

(8) (1889) 15 App. Cas. 19.

compare *Ruabon Brick and Terra Cotta Co. v. Great Western Ry. Co.* (1)

In *Great Western Ry. Co. v. Blades* (2), Buckley J. expressed the view that the rule in *Hext v. Gill* (3), though no doubt good law in circumstances to which it applied, was inapplicable to the meaning of minerals under the Railways Clauses Consolidation Act, 1845: compare *In re Todd, Birleston & Co. and North Eastern Ry. Co.* (4) and *Great Western Ry. Co. v. Carpalla United China Clay Co.* (5) Eve J. has relied in his judgment on *North British Ry. Co. v. Budhill Coal and Sandstone Co.* (6), but the true effect of that decision is that the exception in s. 77 of the Railways Clauses Consolidation Act, 1845, would not include sandstone in a case where that is the rock of which the surface soil is made up. *Caledonian Ry. Co. v. Glenboig Union Fireclay Co.* (7) shows that a technical definition of the meaning of "minerals" is impossible.

[LAWRENCE L.J. That case finally rehabilitates the test laid down by James L.J. in *Hext v. Gill*. (3)]

It also recognizes the validity of Mellish L.J.'s definition in the same case and shows that if there is something in the soil which has the qualities of being exceptional in use or value or character, *prima facie* that will be a mineral within the Act provided it comes within the meaning of "minerals" in common parlance. Here the sand and gravel pockets come within that description: compare also *Symington v. Caledonian Ry. Co.* (8)

In the cases in the House of Lords on the construction of "mines and minerals" in various statutes, the view in the majority of the cases was that in order that the statutory undertaking should have the essential minimum of permanent protection, the undertakers were to have a right of property in that which lay under the permanent way in the ordinary case, and that being so the exception should be interpreted narrowly so as not to take away more than is made absolutely

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(1) [1893] 1 Ch. 427.

(2) [1901] 2 Ch. 624, 636.

(3) L. R. 7 Ch. 699.

(4) [1903] 1 K. B. 603.

(5) [1910] A. C. 83.

(6) [1910] A. C. 116.

(7) [1911] A. C. 290.

(8) [1912] A. C. 87.

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necessary by the wording of the exception. It is admitted that in a case like the present the principle that a grantor should not derogate from his grant has to be taken into account. But the radical distinction between a conveyancing case and a case under a statute is that in the various statutes the right of working is in express and clear language so as to prevent any limitation in it, while in the majority of the private conveyancing cases nothing is said about the right to work, and the implication of law is that working must be done in such a way as not to interfere with the grantee's enjoyment of the thing granted. There was, therefore, no reason to give the reservation in a conveyance anything but its natural meaning taking into account the nature of the transaction and the language used; and there is therefore no need to admit evidence as to the meaning of the words unless it is admissible under one of the recognized principles. In a conveyance of the surface of land with a reservation of minerals the owner is entitled to work them out completely if he can do so without letting down the surface: *MacSwinney on Mines*, 5th ed., p. 165. Here the owner has reserved the right to work by underground workings only, but under the *Mines (Working Facilities and Support) Act, 1923, s. 1*, a right to work otherwise can be conferred. This is only material to show that the result of the appellant's contention that the sand and gravel are reserved minerals would not be that they must remain unworked. It is an additional reason for giving the words of the exception their full natural meaning. The right of working that is reserved throws no light on the extent of the exception: *Midland Ry. Co. v. Robinson*. (1)

The addition of the words "mineral substances," which has been usual since 1910 and appears in the present case, is of great importance. Its effect is to give an expansive meaning which the words "mines and minerals" by themselves might have lacked. Even assuming that "minerals" could be construed so as to exclude surface gravel, the addition of the words "mineral substances" prevents this.

It is only if the Court were against this view and construed "mineral substances" as not including the ordinary substratum of the ground that the question whether the sand and gravel here were exceptional minerals would arise. To be "exceptional" it is only necessary to show that they are capable of being worked at particular points only, and here the evidence shows this to be so. The way the gravel comes to the surface here in no way differs from that in which an outcrop of coal sometimes occurs.

On all these grounds the exception of "mines minerals and mineral substances," included the gravel and sand in question.

Spens K.C. and *Andrewes-Uthwatt* for the respondents. The real question in this case arises on the claim in the writ for a declaration that all sand and gravel situate within or under the lands in question at the date of the conveyance are the property of the plaintiff.

The words "mineral substances" in the reservation were introduced into the conveyance in consequence of the observation of Lord Herschell in *Lord Provost of Glasgow v. Farie* (1) that they embrace such substances as slate and ironstone which cannot be covered by a single genus of minerals. The words have no general meaning which the Court is bound to put upon them in every case. The Court is entitled to look at the surrounding circumstances.

At the date of the conveyance of 1926 the gravel pit in question was known to have existed as an open working for at least forty-five years, and was always used for road mending. It is marked on the ordnance map. Under the reservation set out in the particulars of sale and which was incorporated in the conveyance, the only right reserved to the vendor was the right to get minerals and mineral substances by underground workings.

In *Hext v. Gill* (2) Mellish L.J. pointed out that the result of the authorities was "that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there

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(1) 13 App. Cas. 657, 683.

(2) L. R. 7 Ch. 699, 712.

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is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning": see also *Bell v. Wilson*. (1)

In *Tucker v. Linger* (2) a custom for tenants to remove flints from land leased was held to be reasonable and valid, even assuming that the reservation of "mines and minerals" included flints.

Earl of Jersey v. Guardians of Poor of Neath Poor Law Union (3) shows that the Court in construing a reservation must look at all the surrounding circumstances.

In *George Skey & Co. v. Parsons* (4), in which there was a grant of mines and mines and minerals under certain lands, it was held that surface clay and sandstone were not within the contemplation of the parties when the mines and minerals were granted. As was pointed out by counsel for the defendants in that case, if the plaintiffs were right in their contention the defendants could not build a house, or even plough the land or do any ordinary agricultural operation; and that when the property was put up for auction the surface and mines were sold separately, and the particulars showed that the surface was described as desirable for building purposes. That case is applicable to the present. Here the Court must have regard to the statement in the particulars of sale as to the land being suitable for building purposes. The form of the reservation in the conveyance of 1926 was transferred from the particulars to that conveyance, and it could not have been contemplated that a person buying under the conditions of sale would not get as owner sufficient surface on which to build. Eve J. was therefore right in taking that fact into consideration.

The next question is whether the Court is entitled to look at what is the nature of the common soil of the district, as one of the surrounding circumstances, and it is submitted that it is. The best evidence on this point is the statements on the geological maps.

[LAWRENCE L.J. They were part of the proof and were not cross-examined to.]

(1) L. R. 1 Ch. 303, 307.

(2) 8 App. Cas. 508.

(3) 22 Q. B. D. 555.

(4) (1909) 101 L. T. 103.

That is so. They show that every square foot of soil has pebbles or sand in it. It would therefore be impossible to build a house on this land without disturbing one of these deposits.

The next question is whether the respondents were entitled to ask the experts whether in their opinion this particular gravel and sand were ever included in the term "mines and minerals," and it is submitted that they were: see *Caledonian Ry. Co. v. Glenboig Union Fireclay Co.* (1) Their evidence was that they never were so included.

Then it was contended on behalf of the appellant that the rule of construction adopted in what has been called the code cases is different from that adopted in cases of private conveyances. But it is submitted that there is now no such distinction. For this the respondents rely on *North British Ry. Co. v. Budhill Coal and Sandstone Co.* (2) It is admitted that up to the decision in that case there did exist such a decision as was contended for, but after that decision there is now no distinction in meaning in a reservation of mines and minerals whether it occurs in a private conveyance or in a statutory conveyance.

The judge was therefore right in saying that it is a question of fact in each particular case what passes to the purchaser and what is reserved to the vendor. Here the purchaser must have obtained something more than the mere surface of the soil.

In *Staples v. Young* (3) the Irish Court applied the rule of construction laid down in *Hext v. Gill* (4), and held that sand and gravel were not included in a reservation of "mines and minerals."

[LORD HANWORTH M.R. That case does not amount to much more than a survey of the cases with which we have been occupied for the last two days.]

Here there exists a seam of coal under the land in question sufficient to give a meaning to the words "mines and minerals" in the reservation.

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(1) [1911] A. C. 290.

(2) [1910] A. C. 116, 127, 137.

(3) [1908] 1 I. R. 135, 143.

(4) L. R. 7 Ch. 699.

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It is submitted therefore that the claim made by the appellant in this action cannot succeed.

Sir Leslie Scott K.C. in reply.

Cur. adv. vult.

1931. Nov. 13. The following written judgments were delivered :—

LORD HANWORTH M.R. [after stating the facts as above set out, continued :] There are certain data and facts which were accepted and admitted on both sides at the trial : (1.) While the appellant alleges that it is incorrect to say that the gravel and sand prevailed as the common soil of the district, it is common ground that there was in or near this area a number of gravel pits, some of which were being worked from the surface at the time of the conveyance, or which had been worked recently, if not then still being worked. On looking at the ordnance survey map, which was referred to in the evidence, I find marked on it three old gravel pits and one other gravel pit on the west side of the area in question near the road from Hamstead to Great Barr. On the east side, without going far from Booth's Farm, two existing pits are marked in the line of the road running north and south and leading to Queslett ; (2.) It is admitted that a stratum of coal and ironstone lies under the land conveyed in 1926 ; (3.) The gravel pit from which the gravel and sand have been abstracted by the working which the appellant seeks to prevent has been worked for years by open quarrying from the surface. There was evidence by the defendant Foden and the witness Walters that there was a gravel pit worked on Booth's Farm over a span of forty-five years. And Sir Leslie admitted that this gravel pit as such has been shown on the ordnance maps ever since 1904 ; (4.) It is also admitted that the land has a potential building value, and that if it became necessary to build the defendant would be entitled to dig his foundations and use or sell the out-coming soil ; but Sir Leslie contests his right to do more, on the ground that the property in the gravel and sand has been reserved to the plaintiff, and he contends that there is nothing

inconsistent with the defendant Foden having a right to build and to sink his foundations in the "minerals"—that is the gravel and sand which it is said are reserved to the plaintiff—while the latter retains the property in the sub-soil generally. The plaintiff contends that the defendant had not the right to dig and remove this subsoil in gross—a term suggested by North J. in *Robinson v. Milne* (1)—but only where such action was necessary to the building of a particular house or structure.

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Sir Leslie Scott objected to the judgment of Eve J. on the ground that it was—in part at least—based upon evidence which the learned judge had wrongly admitted at the trial. That evidence was: (1.) As to the meaning of the words, "mines minerals and mineral substances," and the objection to it is because there was no suggestion of local custom or trade usage which would justify such admission; (2.) Of particulars of auction sales for the purpose of interpreting the conveyance, and that the contract of sale by Barton to the defendant Foden, the sub-purchaser, dated April 8, 1926, was relied upon as throwing light upon the interpretation of the conveyance. That contract provided that Barton, as vendor, should sell to the defendant Foden Lot 80—"described in the above particulars and subject to the foregoing special conditions of sale and the general conditions of 1925 so far as the same are applicable to a sale by private treaty." The particulars contained the words: "The freehold property known as Booth's Farm described as Lot 80 in the particulars hereunto annexed," and these latter particulars described the property as possessing "valuable frontages to the Walsall, Aldridge and other roads." Under Lot 80 there was a note that the land was leased to Foden for the term of twenty-one years from March 25, 1913, and that that lease contained a covenant by the lessee to "give up at any time on receiving twenty-one days' notice, any lands that may be required by the lessor for building purposes roads roadways or other reasonable purpose such land not to exceed in the whole five acres." The conveyance of July 28, 1926, to the

(1) 53 L. J. (Ch.) 1070, 1072.

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defendant sub-purchaser recited the above contract and stated that it was made in pursuance of the recited agreements.

I have set out these points of objection in extenso, though it is not, in my opinion, necessary to treat them as essential to the decision of this Court. Accepting the objection to the evidence firstly set out above, it appears to me that, apart from the evidence admitted by Eve J. and assuming that it was inadmissible, there is sufficient in the facts accepted and the matter admitted, tabulated above, to decide this case, within the cases to which our attention has been called, without reference to the evidence objected to. Upon the second point, the admission that the land has a potential building value, and the fact that it is situate where it is, connotes that one purpose to which it could be put was to build upon it, and that that feature must have been present to the minds of the parties to the conveyance of July 28, 1926. I will add that it appears to me that the particulars and conditions are relevant to the construction of the conveyance and can be properly referred to for that purpose.

Before construing the terms of the exception, I desire to make one or two observations upon the cases dealt with by Sir Leslie Scott in his very able argument. He claimed that the Court ought to look at the cases decided, in reference to land taken for railways or the like, where the system of appropriating the soil to the railway and leaving the minerals to the owner except and until a certain procedure prescribed by statute was followed out, from a different angle, and to apply a scrutiny to them different from that applicable to those where the surface and mines or minerals are dealt with by contract, and conveyance, between private individuals. There is authority for this contention to be found in the judgment of Buckley J. in *Great Western Ry. Co. v. Blades*. (1) But that view is definitely rejected by Lord Loreburn in *North British Ry. Co. v. Budhill Coal and Sandstone Co.* (2), and by Lord Shaw (3), and Lord Halsbury said in *Lord Provost of Glasgow v. Farie* (4): "I see no

(1) [1901] 2 Ch. 624, 632.

(2) [1910] A. C. 116, 127.

(3) [1910] A. C. 138.

(4) 13 App. Cas. 657, 672.

reason for concluding that the statutory reservation of minerals means anything different from a reservation of minerals in a private deed." It is the duty of this Court to follow the decision of the House of Lords. I cannot, therefore, accept the criticism that the so-called "code" cases are to be differentiated in their meaning and effect from those that were decided upon conveyances between private owners and purchasers. The suggestion of Buckley J. was, I think, put forward in an effort to reconcile some of the cases—a task by no means easy of accomplishment.

It is not, in my judgment, necessary to go through all the cases cited, and I turn at once to *Hext v. Gill*. (1) It was held in that case that china clay was included in the reservation of "mines and minerals"; but that the reservation of that property did not justify the owner of the minerals in getting the clay in such a way as to destroy or seriously injure the surface. Mellish L.J., in giving his own judgment, which was assented to by James L.J., said that when an owner of both surface and minerals sells the surface and reserves the minerals with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the Court may be able to say that such was clearly the intention of the parties. This observation is, to my mind, relevant to the construction of the reservation to which I will come later on. James L.J., while agreeing with Mellish L.J., gave expression to a dictum which has given rise to much discussion. But for the authorities he would have thought that what was meant by "mines and minerals" in such a grant was a question of fact. What did these words mean in the vernacular of witnesses of three classes—the mining world, the commercial world and landowners?

Lord Provost of Glasgow v. Farie (2) was what has been termed a code case—under s. 18 of the Waterworks Clauses Act, 1847. The decision was that a reservation under the Act of "mines of coal, ironstone, slate or other minerals" did not include common clay forming the surface or subsoil

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(2) 13 App. Cas. 657.

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of the land. The speeches of Lord Halsbury and the other Lords contain many observations that are germane to the present case. Lord Halsbury says (1) that he doubts whether in the present state of the authorities it is accurate to say that in every deed or in every statute the word "minerals" has acquired a meaning of its own independently of any question as to the manner in which minerals themselves are gotten; and (2) he accepts the view of the Lord Ordinary as correct: "In the case of a voluntary sale of land with reservation of minerals, I am satisfied that we should not permit the seller to work the clay to the destruction or injury of the purchaser's estate, because we should hold that the conversion of the estate into a clay-field was not within the fair meaning of the reservation." Lord Watson (3) extracts the principle from the authorities "that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or act embodies. 'Mines' and 'minerals' are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used."

Sir Leslie Scott brought to our attention a great number of cases which illustrated the movement and also the divergence of opinion among the judges who decided them. Some cases he contended were to be read *cum grano* as code cases, while others were more trustworthy guides to a right judgment in the present case because they were cases decided between private persons. I have already pointed out that differentiation between the cases can no longer be adhered to since the decision in *North British Ry. Co. v. Budhill Coal and Sandstone Co.* (4) But that case also demonstrates the futility of trying to extract a principle which will determine the problems of what is granted and what is excepted. "No one principle has been accepted, and every principle appears

(1) 13 App. Cas. 657, 670.

(2) Ibid. 672.

(3) 13 App. Cas. 675.

(4) [1910] A. C. 116.

to have its friends. In these circumstances it would be quite unprofitable to expect a solution by piecing together the dicta of even the most eminent authorities. They are contradictory. Your Lordships find the matter at large, so far as this House is concerned": see per Lord Loreburn. (1) It may be noted, however, that he thought it clear that by the words "or other minerals" exceptional substances are designated, not the ordinary rock of the district. Lord Gorell (2) adds a useful canon of construction: "The enumeration of certain specified matters tends to show that its object was to except exceptional matters, and not to include in its scope those matters which are to be found everywhere in the construction of railways, such as clay, sand, gravel, and ordinary stone": see also on this point *Caledonian Ry. Co. v. Glenboig Union Fireclay Co.* (3), per Lord Loreburn.

The words in the present exception are "mines minerals and mineral substances." The last two words seem to have been added in accordance with the observation of Lord Herschell in *Farie's* case (4), where he suggests that they embrace such substances as slate and ironstone, which cannot be covered by a single genus of minerals.

After considering the above observations of learned judges carefully, I turn to the exception in the conveyance. Upon the admitted facts relating to the area and the purpose for which the land of Booth's Farm was suitable, I cannot hold that the exception was intended to detract from the surface area conveyed, or to allow the vendor to retain the property in the substrata of the surface conveyed even if he was unable to get them. I think the grant and the exception must be construed in reference to this district and this area, in which open quarrying for sand and gravel was to the knowledge of both parties exercised. Regard must be had, as Lord Watson said, to the relative position of the parties interested and to the substance of the transaction or arrangement embodied. These considerations, in my opinion, point to the exclusion

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(1) [1910] A. C. 125.

(3) [1911] A. C. 290, 299.

(2) Ibid. 134.

(4) 13 App. Cas. 657, 683.

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of gravel and sand from the exception reserving minerals and mineral substances, and to an intention that the purchaser should acquire his land without burdensome limitations which might restrict its full user as the soil and subsoil are used in the district: see also *George Skey & Co. v. Parsons*. (1) In my judgment this view is reinforced strongly by the other words to be found in close collocation with the exception. The reservation is of the "mines minerals and mineral substances" within or under the land coloured pink—"together with full power and liberty for the vendor . . . to work and get the same by underground workings only without any obligation to leave any subjacent or lateral support for the surface or any building for the time being erected thereon." The underground workings only are specified for the purpose of getting the mineral substances that lie "under the same," that is, under and without destroying the surface conveyed. It seems to me that it would be a negation of the substance of the transaction to hold that all sand and gravel, which is very generally a part of the soil and subsoil of this farm and worked and gotten from the surface, was excepted from the grant and remained the property of the plaintiff. It would not be a reservation of what is exceptional, but of what is general and of general importance to the utility and efficiency of the land conveyed. The exception ought, as Mellish L.J. points out, if it was intended to have the effect now claimed, to have been expressed in far clearer terms.

For these reasons, which do not invoke assistance from the evidence which is objected to, and without expressing a final opinion upon that part of the case, in my judgment the appeals in both cases fail and must be dismissed with costs.

LAWRENCE L.J. The question to be determined in these actions is whether the reservation of mines, minerals and mineral substances in the conveyance of July 28, 1926, operated to reserve the sand and gravel lying within or under the land granted.

(1) 101 L. T. 103.

It is plain from the numerous authorities cited by counsel that the *prima facie* meaning of the word “minerals” both in private deeds and in statutory provisions will yield to the expressed or implied intention of the parties. In *Farie’s* case (1) Lord Watson said: “The only principle which I can extract from these authorities is this; that in construing a reservation of mines or minerals, whether it occur in a private deed or in an Inclosure Act, regard must be had, not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or act embodies. ‘Mines’ and ‘minerals’ are not definite terms: they are susceptible of limitation or expansion, according to the intention with which they are used.”

In the *Glenboig* case (2) Lord Loreburn L.C. said: “My Lords, the principle of the decision in this House in the *Budhill* (3) and *Carpalla* cases (4) seems to me to have been this: the Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of ‘minerals’ is attainable, the variety of meanings which the use of the word ‘minerals’ admits of being itself the source of all the difficulty.”

In *Hext v. Gill* (5) Mellish L.J. stated that the result of the authorities appeared to be “that a reservation of ‘minerals’ includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning.” James L.J. in the same case, whilst concurring with Mellish L.J. that the authorities had established the proposition stated by him, said that but for those authorities he should have thought that what was meant by “mines” and “minerals” in a grant was a question of fact what those words meant in the vernacular of the mining world and commercial world and landowners at the date of the grant. (6)

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(1) 13 App. Cas. 657, 675.

(2) [1911] A. C. 290, 299.

(3) [1910] A. C. 116.

(4) [1910] A. C. 83.

(5) L. R. 7 Ch. 699, 712.

(6) Ibid. 699, 719.

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The decision in *Hext v. Gill* (1) was followed by a sharp difference of judicial opinion on the question whether the true principle was that laid down by Mellish L.J. or that suggested by James L.J. This difference of opinion was finally settled by the *Budhill* (2) and *Glenboig* cases (3), in which the House of Lords definitely decided that the view suggested by James L.J. was the right view. In my judgment it is not necessary to travel beyond the pronouncements in these two last-mentioned cases in order to ascertain the principles upon which the present cases fall to be determined.

The two main principles to be gathered from these pronouncements are, first, that the word "minerals" when found in a reservation out of a grant of land means substances exceptional in use, in value and in character (such as, for instance, the china clay in *Great Western Ry. Co. v. Carpalla United China Clay Co.* (4)), and does not mean the ordinary soil of the district which if reserved would practically swallow up the grant (such as, for instance, the sandstone in the *Budhill* case (2)); and, secondly, that in deciding whether or not in a particular case exceptional substances are "minerals" the true test is what that word means in the vernacular of the mining world, the commercial world and landowners at the time of the grant, and whether the particular substance was so regarded as a mineral: see per Lord Loreburn L.C. in the *Budhill* case. (5)

Further, it is to be noted that the fact that certain substances can be worked for the purpose of profit may have a bearing upon the question whether they have been recognized as included in the term "minerals," but does not necessarily determine that they have been ordinarily understood to be so included: see per Lord Gorell in the *Budhill* case. (6)

It follows from the decisions in the *Budhill* (2) and *Glenboig* cases (3) that the question whether a given substance is or is not a "mineral" within the meaning of the instrument

(1) L. R. 7 Ch. 699.
(2) [1910] A. C. 116.
(3) [1911] A. C. 290.

(4) [1910] A. C. 83.
(5) [1910] A. C. 116, 127.
(6) *Ibid.* 132.

in which it is mentioned is a question of fact to be decided according to the circumstances of the particular case: see *Symington v. Caledonian Ry. Co.* (1)

The relevant facts in the present case have already been fully stated by the Master of the Rolls and by Eve J.; I will therefore content myself with briefly referring to such facts as have led me to the conclusion that Eve J. was right in his decision.

The Perry Hall Estate, of which Booth's Farm formed part, was twice put up for sale by public auction, once in 1921 and again in 1923. On each occasion the particulars of sale stated generally that the property possessed many miles of valuable road frontages to Walsall and other roads, and that much of it was ripe for present or future building developments, and in the particulars relating to Booth's Farm it was stated that the farm was just off the Walsall Road and that the lessee was under covenant to give up any land (not exceeding five acres) required for (inter alia) building purposes or roads. In the contract for sale to the defendant's vendor Barton and in the contract for the sub-sale by Barton to the defendant the auction particulars which I have mentioned were referred to, and in the conveyance to the defendant both contracts are recited. I think, therefore, that the fair inference is that the plaintiff was holding out not only to the general public, but also to the defendant in particular, that the land conveyed by him was land capable of development as a building estate. The defendant in the witness-box stated that he purchased the land for development purposes.

The liberty reserved to the plaintiff in the conveyance of July 28, 1926, of getting the reserved mines, minerals and mineral substances was by underground workings only, a method of getting wholly inapplicable to the sand and gravel claimed in the present action.

The common soil of the district in which Booth's Farm is situate consists of sand and gravel lying immediately underneath a thin layer of cultivated top-soil averaging about twelve inches in thickness. The evidence of geologists is that

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this substratum of sand and gravel forms one of the triassic group of strata known as the Bunter pebble beds with an addition of some glacial drift. There is a wide belt of this pebble bed and glacial drift formation stretching from the mouth of the Tees to the mouth of the Exe, comprising many thousands of square miles. In the particular locality in question this belt is from three to four miles wide. There are many gravel and sand pits scattered over a wide area in the immediate neighbourhood of Booth's Farm, and one of the gravel pits is on the farm itself. In these circumstances it cannot possibly be said that in the district in question sand and gravel are substances which are rare and exceptional in character. Further, the sand and gravel are not substances which are exceptional in use or value; they are used mainly if not wholly for building and road-making purposes, and their commercial value depends entirely on local requirements and facilities for transport.

It would be impossible to build a house, make a road or lay down a drain on Booth's Farm without cutting into the underlying sand and gravel. The trees and shrubs growing on this farm have their roots embedded in the sand and gravel. It is difficult to imagine that the real nature of the transaction between the parties was as is now alleged by the appellant, and that all he was selling and the defendant was buying was the layer of top-soil (which in some places was practically non-existent) with an implied easement to construct and maintain any buildings, roads and drains he might desire upon and within the underlying sand and gravel retained by and belonging to his vendor.

There are admittedly seams of coal, ironstone and fireclay at a considerable depth below the surface of Booth's Farm, all of which are "minerals" in the vernacular of the mining world, the commercial world and landowners. The existence of these mineral substances is amply sufficient to explain the reason for and object of the reservation in the conveyance of July 28, 1926.

Moreover, evidence was adduced at the trial that sand and gravel are not "minerals" in the vernacular of the

mining world, the commercial world or landowners. Regard being had to the fact that sand and gravel constituted the ordinary soil of the district, this evidence was really unnecessary, as according to the proposition laid down by Lord Loreburn in the *Budhill* case (1) it would only become necessary to consider such evidence if the plaintiff had proved that the sand and gravel claimed by him were exceptional substances. However, the learned trial judge has carefully analysed this evidence, and I agree with his view of the result of it.

But then the appellant contended that the addition of the words "mineral substances" to the words "mines" and "minerals" made all the difference and operated to reserve the sand and gravel. Eve J. held, and I entirely agree with him, that the expressions "minerals" and "mineral substances" mean as nearly the same thing as two expressions can mean. Lord Macnaghten in *Farie's* case (2) said that the word "minerals" in its widest signification meant every inorganic substance forming part of the crust of the earth other than the layer of soil which sustains vegetable life. The appellant did not suggest that any wider or other meaning could properly be given to the words "mineral substances." We were told by counsel for the respondents that the expression "minerals and mineral substances" had been adopted by conveyancers in lieu of the more cumbersome expression, "coal, slate, ironstone and other minerals," formerly in use, in consequence of the remark made by Lord Herschell in *Farie's* case (3) that "there is no common genus within which coal, slate, and ironstone can be comprised, except that they are mineral substances of sufficient value to be commonly worked." Be that as it may, however, I am of opinion that for all practical purposes "minerals" and "mineral substances" are synonymous terms, and that the latter yields to the expressed or implied intention of the parties just as much as the former; accordingly what is said in the authorities as to the meaning of the word "minerals" applies with equal force to the words "mineral substances."

(1) [1910] A. C. 116.

(2) 13 App. Cas. 657, 689.

(3) 13 App. Cas. 683.

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C. A. In the result, for the reasons stated, I agree that these
1931 appeals fail and should be dismissed with costs.

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ROMER L.J. The plaintiff in these actions sought by his pleadings to obtain a declaration that all sand and gravel situate within or under the lands conveyed by him to the defendant Foden by the deed of July 28, 1926, were and are the property of the plaintiff by virtue of the exception in that conveyance of all mines, minerals and mineral substances. Seeing that it is almost impossible to disturb any part of the surface of the land without finding some bit of sand or gravel or both, such an exaggerated claim obviously could not be supported, and, on the appeal, Sir Leslie Scott confined the plaintiff's claim to such beds of gravel and sand as might ordinarily be worked for the purposes of profit. The plaintiff is therefore, in effect, claiming the beds of sand and gravel now being worked by the defendants, the Booth Crushed Gravel Company, Ltd., and, of course, any similar beds of sand and gravel that may be within or under the defendant's land. Whether such beds do or do not fall within the exception is the question to be determined upon this appeal.

For the purpose of assisting us in the determination of this question, our attention has been called to a great number of authorities in which the Courts have been called upon to ascertain the true effect of a conveyance of land containing an exception of "mines and minerals" or "mines of minerals" or the like. I do not recollect that in any of these cases there was in addition an exception of "mineral substances," but I agree with Eve J. in thinking that this expression in no way enlarges the exception. If the word "minerals" had to be given its strict mineralogical meaning, the words "mineral substances" might possibly be regarded as intended to include within the exception substances that were minerals in popular parlance only. But it is clear that the Court has never in modern times treated the word "minerals" as including only things that a mineralogist would designate minerals, but has given to the word a meaning that renders the addition of the words "mineral substances" quite unnecessary.

In order to see what this meaning is it is sufficient to begin with *Hext v. Gill*. (1) For the definition of the word "minerals" given by Mellish L.J. in that case is probably as favourable to the plaintiff as any that can be found in the books within the last sixty years. That definition, stated by the Lord Justice to be the result of the earlier authorities, was this (2): "A reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit." Pausing there, the beds of sand and gravel claimed by the plaintiff would clearly fall within the definition. The learned Lord Justice, however, proceeded to add "unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning." Now the defendants contend that in the present case the Court should, having regard to the context and the nature of the transaction, give the word a more limited meaning and exclude from it the beds of sand and gravel even if the definition of Mellish L.J. can now be accepted as being the correct one. But they further contend that this definition cannot now be relied upon, and that the meaning which James L.J. in the same case would have given to the words "mines and minerals," but for the earlier authorities, is the one that now holds the field. James L.J. said (3): "But for these authorities I should have thought that what was meant by 'mines and minerals' . . . was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners" at the date of the conveyance that has to be construed.

Both these definitions have been considered in many subsequent authorities, and each of them has found adherents of eminence: see, e.g., *Farie's case* (4); *Earl of Jersey v. Guardians of Poor of Neath Poor Law Union* (5); *Great Western Ry. Co. v. Blades* (6); *In re Todd, Birleston & Co. and North Eastern Ry. Co.* (7); and *North British Ry. Co. v. Budhill*

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(2) Ibid. 712.

(3) Ibid. 719.

(4) 13 App. Cas. 657.

(5) 22 Q. B. D. 555.

(6) [1901] 2 Ch. 624.

(7) [1903] 1 K. B. 603.

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Coal and Sandstone Co. (1) It is, however, in my judgment unnecessary to refer to these authorities in detail inasmuch as I have come to the conclusion that, whichever of the two definitions be applied to the present case, the beds of sand and gravel claimed by the appellant are not within the exception contained in the conveyance of July 28, 1926. For both the context in that deed and the meaning attributed to the word "minerals" in the vernacular of the mining world and commercial world and landowners seem to me to exclude these beds from the exception. Looking at the conveyance first, it is to be observed that the only power expressly reserved to the vendor of working and getting the excepted mines, minerals and mineral substances is a power to do so by underground workings. Now at and before the date of the conveyance, sand and gravel was being obtained from the pit at Booth's Farm. The pit admittedly has been shown on the ordnance maps of the district ever since 1904 and, according to Mr. Foden's evidence, was worked by the appellant's predecessor in title thirty years ago. Its existence must, therefore, have been well known to both parties to the conveyance of July 28, 1926. In these circumstances it seems to me incredible that if the parties contemplated an exception of the sand and gravel in this pit, and sand or gravel in similar beds that might be found, the power of getting these materials by open workings from the surface should not have been reserved to the vendor. It was, indeed, suggested in argument that the parties intended that, so far as obtaining the minerals and mineral substances by surface workings was concerned, the vendor was content to rely upon the provisions of the Mines (Working Facilities and Support) Act, 1923. This appears to me a far-fetched and extravagant contention. If the vendor had the provisions of this Act in mind, it is difficult to understand why he did not rely upon them in respect of underground workings as well. It is still more difficult to understand why, if he was relying upon the provisions of that Act to enable him to work the sand and

(1) [1910] A. C. 116.

gravel in question, he did not avail himself of the definition of the word "minerals" in that Act and include in the exception all substances in or under the land obtainable by underground or surface working. This would have effectually prevented any questions arising as to whether the sand and gravel was included. I cannot think that if he had possessed so intimate a knowledge of the law as to bear in mind the provisions of the Act he would have been ignorant of the danger of relying upon the words "minerals and mineral substances" for the purpose of reserving the sand and gravel beds. I prefer to think that he was ignorant alike of the Act and of the dangers from which the definition in the Act would have saved him. The reservation of a power of getting the excepted minerals by underground workings was in my opinion meant to exclude a power of working from the surface, and clearly indicates that the beds of sand and gravel in question were not intended to be excepted.

But, apart from this indication of intention afforded by the context in the conveyance, the evidence as to the meaning of the words "minerals and mineral substances" in the relevant vernacular leads to the same conclusion. Mr. Nightingale, who is a mining engineer, land agent and surveyor, and has been well acquainted with this particular district for years, was called as a witness for the plaintiff. In the course of his cross-examination he was asked this question: "I suggest to you that nobody—no contractor or mining engineer or anybody else—in this area who wanted to get or to find surface sand or gravel such as we say exists throughout this area would have considered for one moment an advertisement of mines, minerals and mineral substances under any part of this area?" and he answered "No." Mr. Ridsdale, a mining engineer, who has known the area in question all his life said that he had never come across a case in which gravel or sand in the area had been offered for sale as minerals or mineral substances. Mr. Holland, another mining engineer who, like Mr. Ridsdale, has known the area intimately all his life, said that he had never heard the sand and gravel referred to as minerals or mineral substances. Mr. Walters, an

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C. A. auctioneer, who has carried on business in the area for over
1931 forty years, said that he had never heard it suggested that
WARING this sand and gravel below the subsoil was a mineral or a
v. mineral substance, and that he had never known of sand
FODEN. and gravel being dealt with or described in the area as mines
WARING and minerals. He said that the usual expression in the
v. neighbourhood was "mines and minerals, sand, gravel and
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This evidence which, if the definition of minerals given by James L.J. is to be accepted, must as it seems to me necessarily be admissible, was uncontradicted so far as I have been able to ascertain, and this is not surprising. For it is only what I should have expected in view of the evidence as to the geological formation of the district. The beds of sand and gravel claimed by the plaintiff either form part of the pebbled formation of the Bunter series or, as regards the sand, are glacial deposits, and together they form the common surface rock of the district.

In my judgment, Eve J. was right in holding that this sand and gravel was not excepted out of the conveyance to the defendant, and these appeals should be dismissed with costs.

Appeals dismissed.

Solicitors for appellant: *Sparks, Russell, Isard & Co.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Crockford & Sons, Birmingham.*

W. I. C.

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The Road Traffic Act, 1930, by s. 72, sub-s. 1, prohibits the use of any vehicle as a stage carriage or express carriage for public service, as defined by s. 61, except by persons holding a road service licence or licences to be granted by the Commissioners of the traffic areas created by the Act, through which the route passes subject to the conditions thereby provided. By s. 96, the Minister of Transport is authorized to make such orders as he may consider necessary for the transition from the enactments superseded by Part IV. of the Act, regulating the use of public service vehicles, to the provisions of Part IV., and may provide that existing licences in force before the commencement of the Act shall continue in force for a period fixed by the Order. By the Public Service Vehicles (Transitory Provisions) No. 2 Order, 1931, dated March 13, the Minister ordered that where a person was, on February 9, 1931, operating a service of public vehicles, and had before March 31, 1931, applied for a road service licence under the Act, it should not be deemed to be an offence for him to continue that service pending the grant or refusal of that application. The prohibition contained in s. 72, sub-s. 1, of the Act was first brought into force, by Order of the Minister of Transport, on April 1, 1931.

The defendants commenced to operate a service of express coaches over a route between London and Aylesbury on February 26, 1931, and applied in the prescribed manner for the grant of a road service licence from the Commissioners of the Eastern Area through which the route passed before March 31, 1931, but their application was refused and an appeal to the Minister from the refusal dismissed. The defendants were later prosecuted and convicted at petty sessions for running their service without a road service licence, but, notwithstanding the conviction, continued to do so.

In an action by the Attorney-General, at the relation of other motor coach owners holding licences to operate on the same route, for an injunction to restrain the defendants from continuing their service:—

Held, (1.) that the action was maintainable notwithstanding that the Act created a statutory offence and provided a penalty for its breach.

(2.) That as the defendants were not operating a service of coaches on the route in question on February 9, 1931, they did not come within

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the terms and conditions of the Public Service Vehicles (Transitory Provisions) Order, No. 2.

(3.) That in fixing February 9 as the critical date on which coach services must have been in operation to obtain the protection of the last mentioned Order, the Minister was not acting ultra vires the Act or unreasonably.

(4.) That s. 81, sub-s. 3, dealing with appeals to the Minister from a refusal to grant a new licence to a person who had held an old licence did not apply to the defendants as they had never held any licences for the particular route under the Act, only under earlier superseded Acts.

Attorney-General v. Sharp [1931] 1 Ch. 121 applied on the first point.

The Court made a declaration in favour of the relators on the defendants undertaking not to renew the service without obtaining a licence.

ACTION.

The action was brought by the Attorney-General at the relation of Edward Maurice Cain, Reginald Arthur Cain, and William Clifford Cain, trading as the Red Rover Saloon Coaches, and holders of road service licences under the Road Traffic Act, 1930, for the route between London and Aylesbury, via Tring, on which they were operating a service of express coaches, claiming an injunction to restrain the defendants, who were also motor coach proprietors, from operating a service of express coaches over the same route without having obtained from the Commissioners of one of the areas through which the route passed a road service licence, backed by the Commissioners of the other areas, under s. 72 of the Act.

The facts of the case and the material sections of the Road Traffic Act, 1930, are stated shortly in the headnote and fully in the arguments and judgment below.

J. W. Manning K.C., *Roger W. Turnbull* and *Miss V. J. M. Stephenson* for the plaintiff. The relators carry on business as the Red Rover Saloon Coaches and have obtained from the Commissioners of one of the traffic areas between London and Aylesbury a road service licence for their coaches, duly backed in the other areas under s. 73, and they operate a service of express coaches between London and Aylesbury under this licence.

The defendants are carrying on a similar service over the same route between London and Aylesbury, notwithstanding

that they have applied for and have failed to obtain a road service licence for each of the three traffic areas through which the route passes. On August 6, 1931, the defendants were convicted at Willesden Petty Sessions for operating a service over the route without a road service licence and were fined 5*l.* and costs. Notwithstanding the conviction the defendants went on with their service, and, although it has been stopped for the time being, they still threaten and intend to operate a service of express coaches on the route. The plaintiffs are entitled to an injunction to restrain the defendants. The material portion containing the prohibitive words of s. 72 of the Road Traffic Act, 1930, was brought into operation on April 1, 1931, by an order of the Minister of Transport dated March 20, 1931. On that date it became an offence to operate a road service vehicle on the road without a licence. But to prevent hardship the Public Service Vehicles (Transitory Provisions) Order, 1931 (March 13), was made by the Minister, under para. 6 of which any applicant can, pending his application for a licence and the final decision on it, continue to operate a public service which existed on February 9, 1931. The defendants do not come within that Order, as they did not begin operating their London-Aylesbury service until February 26 at earliest.

The word "operating" means running a public service of which public notice is given and which has been previously approved by the licensing authorities. The word, however, is not defined in the Act. No public coach licences were required on this route before the Act of 1930 came into force, except in the Metropolitan Police District, under the Metropolitan Public Carriage Act, 1869, and in the borough of Aylesbury under the Town Police Clauses Act, 1847.

The defendants have appealed to the Minister of Transport from the refusal of the Traffic Commissioners for the Eastern Area to grant them a licence, but on October 1 their appeal was dismissed, and any permission to run services under the Transitory Provisions Order was withdrawn.

Comyns Carr K.C. and *B. L. A. O'Malley* for the defendants. Where a statute imposes a penalty for an offence, the Court

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EVE J. 1931 has normally no jurisdiction to grant an injunction to restrain the commission of the offence: *Institute of Patent Agents v. Lockwood*. (1) But it has been held in certain cases that the Court can grant an injunction if the action is by the Attorney-General. In all these cases, however, the relator was a public body entrusted with the duty of enforcing the regulations or by-laws, the breach of which was complained of: *Attorney-General v. Ashborne Recreation Ground Co.* (2)

[EVE J. referred to *Devonport Corporation v. Tozer*. (3)]

In the present case the relators are not a public body, but merely trade competitors, and on this ground these decisions are distinguishable: *Attorney-General v. Wimbledon House Estate Co.* (4); *Attorney-General v. Sharp*. (5) In the former case the relators were an urban district council, in the latter the Corporation of Manchester. In *Attorney-General v. Shrewsbury (Kingsland) Bridge Co.* (6) the action was by the Attorney-General on the relation of two shareholders of the company to restrain the company from proceeding with unauthorized works, and an injunction was granted. But there was no alternative remedy in that case, no new offence was created by statute, and no penalty provided for a breach of the statute. The only point there argued was that no injury to the public had been proved. The principle laid down in all the other authorities, where the Attorney-General sued, is limited to cases where the local authority is moving to protect public interests, or the relator has a right of property. The action cannot be brought at the suit of relators who could not have instituted proceedings under s. 95 of the Road Traffic Act, 1930.

But secondly, even if the Court has jurisdiction to grant an injunction, that is a matter of discretion, which the Court ought not to exercise in favour of the relators. They are seeking to use the Act to obtain a monopoly of the coach traffic over this route. The defendants' predecessors in the business applied for licences to the Town Clerk of Aylesbury

(1) [1894] A. C. 347.

(2) [1903] 1 Ch. 101.

(3) [1902] 2 Ch. 182.

(4) [1904] 2 Ch. 34.

(5) [1931] 1 Ch. 121.

(6) (1882) 21 Ch. D. 752.

as early as October, 1929, and obtained licences under the existing law in July, 1930. They also held licences in the Metropolitan Police District, which were renewed in March, 1931. The route and time-table were approved by the Aylesbury Council on October 30, 1929, and any delay in actual operation has been caused by non-delivery of new coaches from the builders. Even if a technical offence has been committed, there is a case of serious hardship.

Under s. 123 the Act has been brought into force on several different dates as to different parts thereof. The bulk of Part IV. came into force on January 1, 1931, but the rest of it, including the material sections repealing previous enactments, did not come into force until April 1, 1931. The Public Service Vehicles (Transitory Provisions) No. 2 Order, which fixed February 9 as the date after which no existing service could be recognized was made on March 13. At this date neither the repeal section nor the penalties section had come into force, and therefore the defendant company was running a lawful service: see Interpretation Act, 1889, s. 38 (b) and (c). The defendants having applied for road service licences to the Commissioners of the respective areas through which the route runs, are entitled to carry on their service until their applications are effectually disposed of.

The word "operating" must be construed reasonably, and, if the defendants have licences under the existing law, the fact that they have not the vehicles necessary to run the service should not prejudice them.

The whole of the Transitory Provisions Order is ultra vires, as it purports to exempt a person from the penalty for the commission of an offence which did not exist at the date of the Order. The existing statutes under which the defendants were operating had not been superseded. The old licence remains in force under s. 81, sub-s. 3, until a new one is granted under the Act. At least Part IV. of the Act could not be brought into force so as to make the operation of a service within the Metropolitan Police Area, which extends into Hertfordshire, an offence under the Act.

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EVE J. *Manning K.C.* in reply.

1931 [EVE J. I do not call upon you on the question of jurisdiction or of discretion or on s. 81, sub-s. 3, or on what constitutes "operation."]

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The possession of local licences for the Metropolitan Police Area, and for the borough of Aylesbury under the Town Police Clauses Act, 1847, does not dispense with the necessity for the defendants to hold a road service licence from the Commissioners of one of the areas, "backed" under s. 73 in the other areas. At the same time the local licences for public service vehicles are kept alive. In the same way the Metropolitan Public Carriage Act, 1869, is repealed only as regards s. 5, which excepted vehicles travelling in and out of London. That exemption is now taken away. The defendants' coaches must still carry a stage carriage licence under s. 67 of the Act of 1869, besides the public service vehicle licence under s. 67 of the Act of 1930, the certificate of fitness under s. 68, and the road service licence under s. 72 of the Act. As from April 1, in addition to the other licences, it was incumbent on the defendants to hold a road service licence.

EVE J. The writ in this action was issued on August 14 last, and the Attorney-General, suing at the relation of three individuals, trading as the Red Rover Saloon Coaches, claims thereby an injunction to restrain the defendants from causing or permitting any motor vehicle to be used on the road between London and Aylesbury, or any part thereof, as a stage carriage or an express carriage within the meaning of s. 61 of the Road Traffic Act, 1930, without having first obtained from the Traffic Commissioners appointed under the Act in respect of the traffic areas in which the said road is situate a licence under s. 72 of the said Act for that purpose.

Part IV. of the Act is the part relevant to these proceedings. It deals with the regulation of public service vehicles, that is to say, motor vehicles carrying passengers for hire or reward at separate fares, and divided into three classes, distinguished as stage, express and contract carriages.

At the date of the writ the relators and the defendants were both operating a service of public service vehicles between London and Aylesbury. For the purposes of Part IV. of the Act, England and Scotland have been divided into traffic areas (see ss. 62 and 63), and Commissioners have been appointed for each area, charged with the duty of issuing licences and exercising such other powers and performing such other duties as are conferred or imposed on them by or in pursuance of the Act. The route from London to Aylesbury involves the entry upon three areas, distinguished as the Metropolitan, the Eastern, and the East Midland, and the practice with regard to licences where more than one area is entered upon has been that the Commissioners of one of the areas grant the licence, and the licence is backed or endorsed by the Commissioners of the other areas, the object being to limit the number of licences, and at the same time make a licence granted for one part of the route available for the whole route, by means of the endorsements.

No person can use or permit a motor vehicle to be used on any road as a stage, express, or contract carriage, unless he is the holder of a licence to use it as a vehicle of that class in accordance with Part IV. of the Act. This licence is referred to as "a public service vehicle licence" (s. 67, sub-s. 1); and no vehicle can be used as a stage or express carriage except under a licence granted to a person applying for a licence to provide such a road service as may be specified therein. This licence (s. 72, sub-s. 1) is referred to as "a road service licence," and every person applying for it (sub-s. 5 of the same section) must submit to the Commissioners particulars of the type or types of vehicle to be used, and, in the case of regular services, the time-tables and fare-tables of the services which it is proposed to provide under the licence, and in any other case such particulars as to the frequency of the services and the times to be taken on the journeys included in those services as the Commissioners may require; and by s. 72, sub-s. 3, in exercising their discretion to grant or refuse a road service licence in respect of any route, and their discretion to attach conditions to any such

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licence, the Commissioners are to have regard to : (a) The suitability of the routes on which a service may be provided under the licence ; (b) the extent, if any, to which the needs of the proposed routes, or any of them, are already adequately served ; (c) the extent to which the proposed service is necessary or desirable in the public interest ; and (d) the needs of the area as a whole in relation to traffic (including the provision of adequate, suitable and efficient services, the elimination of unnecessary services and the provision of unremunerative services), and the co-ordination of all forms of passenger transport, including transport by rail. They are also to take into consideration any representations which may be made by persons who are already providing transport facilities along or near to the routes, or any part thereof, or by any local authority in whose area any of the routes or any part of the routes is situate—very wide powers, and an indication of a very large variety of circumstances which the Commissioners have to take into consideration in determining whether a licence is to be granted.

Any person using a vehicle or causing or permitting it to be used in contravention of s. 72 shall be guilty of an offence and be liable, in the case of a first offence, to a fine not exceeding 20*l.*, and in the case of a second or subsequent conviction to a fine not exceeding 50*l.*, or to imprisonment for a term not exceeding three months (s. 113).

Sect. 96 provides that the Minister of Transport may by order make such provision as he considers necessary for the transition from the enactments superseded by Part IV. to the provisions of Part IV., and may thereby provide that any licence relating to a public service vehicle in force immediately before the commencement of the Act shall continue in force for such period and with such effect for the purposes of Part IV. as may be provided by the order ; and by s. 123 the Act is to come into operation on such day or days as the Minister appoints, and the Minister may fix different days for different purposes and different provisions of the Act.

Most of the provisions of Part IV. of the Act came into operation for all purposes, either on December 1, 1930, or

January 1, 1931—see the Road Traffic Act, 1930 (Date of Commencement), Order (No. 2), dated November 25, 1930. There were, however (Second Schedule, Part I.), excepted from this order the following words, to be found in s. 72, sub-s. 1: “and a vehicle shall not be used as a stage carriage or an express carriage except under such a licence”; so dealt with, s. 72, sub-s. 1, reads as follows: “Subject to the provisions of this section the commissioners may grant to any person applying therefor a licence (in this Act referred to as a ‘road service licence’) to provide such a road service as may be specified therein.” Sub-ss. 8 and 9 were also excluded from the Order which brought parts of the Act into operation on January 1.

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By the Road Traffic Act, 1930 (Date of Commencement), Order (No. 2), 1931, dated March 20, the excepted words came into operation for all purposes on April 1, 1931, as also did the excepted sub-ss. 8 and 10, and in the meantime, that is between the date of January 1 and April 1, pursuant to s. 96, the Minister made an Order dated February 9, 1931, cited as the Public Service Vehicles (Transitory Provisions) Order, 1931. This Order (referred to as the “Principal Order”) was amended by a subsequent Order of March 4, 1931 (referred to as the “Amendment Order”), and by a third Order dated March 13, the Principal Order and the Amendment Order were both revoked and it was thereby ordered, by para. 6, that: “Where a person was on the 9th February, 1931, operating a service of public service vehicles and has before March 31, 1931, applied in the prescribed manner to the Commissioners for any traffic area for the grant or backing of a road service licence authorising the continuance with or without modifications of that service within that area, it shall not be an offence by reason only of the fact that he is not the holder of a road service licence authorising that service for the applicant, pending the grant or refusal of his application by the Commissioners, to continue to operate that service within that area, subject at all times to any conditions or restrictions which were in force on 9th February, 1931, with such seasonal variations of the service as were in operation

EVE J. 1931 during the corresponding period of the year 1930." This Order is cited as the Public Service Vehicles (Transitory Provisions) (No. 2) Order, 1931.

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I think these are all the statutory provisions to which at the moment I need direct attention, and I have to consider the facts to which they have to be applied in this case.

The defendants ran their first public service vehicle on the London and Aylesbury route on February 26, and a month later they applied to the Commissioners for a road service licence. After the end of March they continued to run their vehicles, and as by that time the whole of s. 72, sub-s. 1, was in operation they would seem at first sight certainly to be guilty of an offence thereunder (see in particular the concluding words of sub-s. 1 and sub-s. 10 of s. 72). So at any rate thought the justices when they were summoned and on August 6 convicted at petty sessions for operating the said route without a road service licence. On July 23 the Traffic Commissioners of the East Midland Area refused to grant them a licence, and as the service was continued even after the licence was refused and the conviction had been obtained, the writ in this action was issued on August 14.

On September 8 the defendants appealed to the Minister, stating grounds for the appeal from the refusal of the Commissioners of the East Midland Area to grant them a licence. On October 1 the result of the appeal was communicated to the defendants, and they were warned of what the consequences would be if they still continued to operate, the appeal having been dismissed and the decision of the Commissioners upheld; and then, and then only after a little pressure, the service which the defendants had been running from February 26 continuously was determined, and the plaintiffs proceeded with the action which has now come on for trial. As I have said, *prima facie* it would appear that the defendants were using their vehicles in contravention of the Act and were committing an offence for which they could be prosecuted under the Summary Jurisdiction Acts. The first question I have to decide is whether that was the

only remedy available, or is this action maintainable notwithstanding that the offence and the penalty therefor are respectively created and fixed by the same statute.

The general rule is that where an Act creates an offence and provides a remedy the only remedy is that provided by the statute, and had this action been commenced and prosecuted by the relators it is, I think, pretty clear that the objection of the defendants to the maintenance of this action would have prevailed. For this conclusion I think the case of *Institute of Patent Agents v. Lockwood* (1) would have furnished sufficient authority. But that is not the nature of this action. The Attorney-General has been invoked, and he has intervened in order to assert, not only the rights of the three relators joined with him as co-plaintiffs, but of the public at large. The public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land. The point is concluded against the defendants by the recent decision of the Court of Appeal in *Attorney-General v. Sharp*. (2)

This conclusion drives Mr. Carr back to his second line of defence, which is that the remedy by way of injunction is a discretionary one and ought not to be imposed in this case. I cannot accept that view. This is not the case of a trivial or solitary invasion of the plaintiff's rights. In such cases the granting of an injunction in the absence of any indication on the part of the defendant to repeat the offence might well be regarded as an excessive punishment to inflict, but here I have to deal with defendants, who, notwithstanding frequent warnings, the refusal of their licence and a conviction recorded against them for the offence of operating their vehicles

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without a licence, nevertheless continued to commit day by day, and many times a day, the same offence, and even now, although they have in fact discontinued the service for the time being, have so far given no indication of their intention to abandon it permanently, and in such a case the only proper remedy is obviously an injunction.

The next points raised relate to the Order of March 13. It was argued first that the Order was *ultra vires* in that the Minister had no power to fix an arbitrary date (February 9) as the relevant one for determining whether an applicant was qualified to apply for a licence, and secondly, that if it were *intra vires* the defendants were in fact operating the service on the date mentioned. The defendants applied for the licence before March 31, and they assert that they were operating the service on February 9. I have heard the evidence upon that, and it is quite clear they were not so doing. They had ordered their vehicles, and some which they contemplated using on this route had been delivered, but for the time being they were in use on other routes. They had, too, taken some steps prior to February 9 to instruct the drivers and conductors who were to be employed on this route; but these measures did not, in my opinion, amount to operating the route. I think they first did that on February 26. Therefore, they did not fulfil the first of the two conditions which entitled them to apply for a licence. They applied for it within the time, but they were not operating on February 9. There is nothing in the *ultra vires* suggestion. The power to make such provision as he should consider necessary for the transition was vested in the Minister under s. 96, and for determining who should be qualified to apply for a licence for a particular route it is impossible to say that it was not reasonable to require that the applicant should have already been operating that route for a fixed time.

Reference was made to the Interpretation Act, 1889, s. 38, sub-s. 2 (b) and (c), but I am not sure I appreciated it, and it was not supported by any argument after attention had been directed to the words "unless the contrary intention appears," which are to be found in s. 38.

Finally, the defendants relied on the provision in s. 81, sub-s. 3, that "Where a person who has applied for a new licence in substitution for a licence held by him and in force at the date of his application appeals to the Minister on the ground that his application has been refused or has not been granted, the existing licence, and, if that licence is a road service licence, any backing thereof, shall continue in force until the appeal has been disposed of, notwithstanding the provisions of this Act as to the expiration of the licence by effluxion of time." It is quite obvious that provision has no application whatever to the defendants. They were not applying for any licence to replace an old one, but for a new licence altogether wherewith to start a new service. All that this sub-section provides is that if the applicant who has had a licence applies in the ordinary way for its renewal, and if the renewal is refused, and he has to appeal to the Minister, he shall not suffer whilst the matter is being considered on appeal; the existing licence, with the advantage, if it happens to be a road service licence, of any endorsement or backing, shall continue in force until the Minister has disposed of the appeal. It does not apply to the facts of this case, and cannot, in my opinion, afford a defence to the defendants.

The conclusion at which I have arrived is that the plaintiffs have established their case and are entitled to an injunction, but if the defendants instruct counsel that they do not intend to resume the service, and will give an undertaking to that effect, the plaintiffs will I doubt not be satisfied with that.

Solicitors: *Wedlake, Letts & Birds*; *J. R. Cort Bathurst.*

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[1931. B. 4239.]

Settled Land—Law of Property—Settled Land Subject to Mining Lease—Power of Tenant for Life to Vary Lease—Surrender and Regrant—Estoppel—Tenant for Life and Remainderman—Rents and Royalties—Capitalization—“Contrary Intention”—Settled Land Act, 1925 (15 Geo. 5, c. 18), ss. 47, 59.

Under the will of Lord Robert Bruce, who died in 1912, the plaintiff was tenant for life in possession of certain beds of ironstone and other minerals subject to a lease executed in 1908 which bound the testator and persons claiming under him.

The lease was for a term of forty years expiring on March 25, 1947, subject to the payment of the rents and royalties and the covenants on the part of the lessees therein contained.

By an order made on July 20, 1916, in the Chancery Division, in the matter of the estate of the testator, it was declared that upon the true construction of his will the then tenant for life in possession was entitled to the whole of the rents and royalties under the lease.

By a deed dated March 25, 1931 (hereinafter called “the extension deed”), and made between the plaintiff (who, upon the death in 1917 of his brother without issue, succeeded to the settled estates as tenant for life) as lessor of the one part and the lessees of the other part, pursuant to s. 59 of the Settled Land Act, 1925, it was agreed that the lease should operate as if the minerals had been demised for a term commencing on March 25, 1907, and expiring on March 25, 2006; and the lessor then demised to the lessees the minerals and mining rights demised by the lease as from March 25, 1931, until March 25, 2006, subject to the payment of the rents and royalties and the covenants and conditions respectively reserved by and contained in the lease as the same were respectively varied by the extension deed. And it was further agreed that the lease should be construed and have effect, as if the term thereby granted had been a term expiring in 2006 and the variations specified in the schedule to the extension deed had been originally comprised in the lease; and that, except as varied by that deed, the lease and the term thereby granted should be deemed to remain on foot in all respects as if that deed had not been executed.

The question was one between the plaintiff and his infant son the first tenant in tail in remainder and was, from what date the latter was entitled to have one-fourth of the rents and royalties capitalized in his favour under s. 47 of the Settled Land Act, 1925, regard being had to the order of 1916 and to the question whether the extension deed operated by way of surrender of the original term granted by the lease:—

Held, first, that, even if the extension deed did operate as a surrender of the original term granted by the lease and a grant of a new term, the

provisions for capitalization made by s. 47 of the Settled Land Act, 1925, did not apply to the rents and royalties accruing during the whole of the original term of forty years, as the settlement by the construction placed upon it by the order of 1916 showed a contrary intention within the meaning of that section.

Secondly, that, as between tenant for life and remainderman, the former was not estopped from denying that the extension deed operated, against the intention of the parties to it expressed in that deed to keep the original term on foot, as a surrender of that term.

Accordingly, that the plaintiff, if and so long as his tenancy for life subsisted under the settlement, was entitled to the whole of the rent and royalties which accrued under the lease as varied by the extension deed during the residue of the original term of forty years; but that, as from the expiration of that term in 1947, one-fourth of the rents and royalties ought to be capitalized, pursuant to s. 47 of the Settled Land Act, 1925.

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At the date of his death on February 15, 1912, Lord Robert Bruce was absolutely entitled to certain estates in the county of Northampton, subject to a certain life estate and jointure rentcharge, both of which long since terminated, and subject also to a lease made in 1908 of the minerals under parts of the estate.

Lord Robert Bruce, by his will dated October 30, 1901, devised, amongst other properties, his estates in the county of Northampton to the use of his first son James E. J. Brudenell Bruce for his life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the testator's second son George L. T. Brudenell Bruce, and his third, fourth and other sons successively according to seniority for their respective lives with remainder immediately after the estate for life of each such son to the use of his first and other sons in tail male. And the testator declared that every estate for life should be without impeachment of waste.

By the lease which was made on June 26, 1908, and was therefore binding on the testator and persons claiming title under him, certain beds of ironstone and other minerals lying in and under the lands therein described and situate in the county of Northampton, with power to work, raise and get the same, were demised unto Lloyds Ironstone Company, Ltd., for the term of forty years from March 25, 1907, subject to

CLAUSON J. the payment of a fixed minimum rent and certain other rents and royalties thereby reserved, and to the covenants on the part of the lessees and conditions therein contained.

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BRUCE, *In re.* By an order made in the Chancery Division on July 20, 1916, in the matter of the estate of Lord Robert Bruce, it was declared that, upon the true construction of his will and in the events which had happened, James E. J. Brudenell Bruce, as the then tenant for life in possession under the settlement made by the will, was entitled to the whole of the rents and royalties derived from the settled mines and minerals which were then open under leases granted by the Right Hon. James Thomas Brudenell, Earl of Cardigan, or by the trustees of his will, which included the lease of June 26, 1908.

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Upon the death of James E. J. Brudenell Bruce on April 11, 1917, without issue, his brother, the plaintiff, George L. T. Brudenell (who on July 17, 1917, assumed the surname of Brudenell instead of Brudenell Bruce), became tenant for life in possession of the estates settled by the will of Lord Robert Bruce.

By a deed dated November 2, 1923, and made between the plaintiff, who was the person then entitled to the reversion expectant on the term granted by the lease, of the one part and the lessees thereunder of the other part, it was agreed that the method of arriving at the royalties payable under the lease should be varied in the manner therein specified.

By a deed dated March 25, 1931 (hereinafter called "the extension deed"), and made between the plaintiff of the one part and the lessees of the other part, after a recital that the plaintiff was satisfied that, having regard to the money which had been and was going to be laid out for the benefit of the settled land by reason of the development of the minerals, it was proper that the term of the lease should be extended and that the minimum rents and royalty rents reserved thereby and other matters contained therein should be varied; pursuant to the provisions of s. 59 of the Settled Land Act, 1925, it was agreed that the lease should thenceforth operate, have effect and be construed as regarded the premises demised

thereby, as if those premises had been originally stated to have been granted to the lessees for a period of years commencing on March 25, 1907, and expiring on March 25, 2006, the intention of the parties being that the term of years granted by the lease should not be surrendered or merged, but should continue as extended by that deed. And the plaintiff in consideration of the covenants by the lessees thereafter contained and in exercise of the power for that purpose conferred upon him by the Settled Land Act, 1925, and of any other powers enabling him demised unto the lessees all the mines and minerals, rights and liberties demised by the lease, to hold unto the lessees as from the date thereof, until March 25, 2006, but subject to the payment of the rents and royalties reserved by the lease as varied by the extension deed and to the performance and observance of the covenants and conditions contained in the lease as varied by the same deed and to a proviso for re-entry similar to that in the lease contained. It was further agreed that the terms and conditions contained in the schedule should as from March 25, 1931, be deemed to be incorporated in the lease, and that the lease should as from that date be construed and have effect as if the term thereby granted had been a term expiring on March 25, 2006, and the terms and conditions in the schedule had been originally comprised in the lease. Then there were covenants by the lessees that they would at all times after March 25, 1931, during the term granted by the lease and as so extended perform and observe the covenants on their part and conditions contained in the lease and in the schedule. And except as by the extension deed varied and extended, the lease and the term should be deemed to remain on foot in all respects as if the extension deed had not been executed. Then by the schedule it was provided that, in substitution for the minimum rent and the royalties payable under the lease as varied by the deed of 1923, the minimum rent and the royalties, of which particulars were given in the schedule, should be payable as from March 25, 1931.

For the purpose of giving effect to the agreement contained in the extension deed for the extension of the term granted

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by the lease and for the variation of its terms, the plaintiff, at the time of executing that deed entered into an agreement in writing with the lessees that he would, on their request, accept a surrender of the lease, and in exercise of the powers conferred upon him by the Settled Land Act, 1925, grant to the lessees a lease of the minerals and rights comprised in and demised by the lease and the extension deed for a term commencing from such surrender and expiring on March 25, 2006, at the rents and royalties reserved by the lease as varied by the extension deed: provided that the plaintiff should not be under any obligation to accept such surrender and grant such new lease unless it should have been determined by a judgment of the High Court of Justice that the extension deed had not operated so as to extend the original term of the lease.

An originating summons was accordingly issued by the plaintiff raising the questions whether, notwithstanding the execution of the extension deed and the agreement of even date therewith, the plaintiff as tenant for life in possession under the settlement was still entitled to the whole of the rents and royalties reserved by the lease as varied by the deed of November 2, 1923, and the extension deed, or whether (a) as from the execution of the extension deed, or (b) as from the expiration of the original term granted by the lease, one-fourth of the rents and royalties ought to be set aside as capital pursuant to s. 47 of the Settled Land Act, 1925.

A. F. Topham K.C. and *John Bradley Dyne* for the plaintiff. Sect. 59 of the Settled Land Act, 1925 (1), enabled the

(1) Sect. 59, sub-s. 1 :—"A tenant for life may, at any time, by deed either with or without consideration in money or otherwise, vary, release, waive or modify, either absolutely or otherwise, the terms of any lease whenever made of the settled land or any part thereof, or any covenants or conditions contained in any grant in fee simple whenever made of land with or subject to a reservation thereout of a rent which is or forms part of the settled land, and in either

case in respect of the whole or any part of the land comprised in any such lease or grant, but so that every such lease or grant shall, after such variation, release, waiver or modification as aforesaid, be such a lease or grant as might then have been lawfully made under this Act if the lease had been surrendered, or the land comprised in the grant had never been so comprised, or had been re-granted."

plaintiff to extend the term of the lease and vary the method of calculating the rents and royalties without accepting a surrender of the old term and granting a new one, provided the lease, as is the case here, was one which might have been lawfully made under the Act, if the lease had been surrendered. The plaintiff does not dispute the right of the tenant in tail to have one-fourth of the rents and royalties capitalized from 1947, the date of the expiration of the original term of the lease. But he is not entitled to have them capitalized before that date. In *In re Kemeys-Tynte* (1) the tenant for life, acting under s. 12 of Settled Land Act, 1882, granted a lease of coal to give effect to the pre-existing agreement on the part of his testator; and it was held that s. 11 of that Act did not apply, but that he was entitled to the whole of the rents and royalties. The decision in *In re Hall* (2) is to the same effect. The order of July 20, 1916, by Sargant J. is consistent with the principle established by those two cases. By the deed of variation of November 2, 1923, the tenant for life for the time would only have power to vary the terms of the lease during the subsistence of his own life interest; he could not and did not purport to bind the remainderman. And, had the later extension deed of 1931 been executed before the Act of 1925, the remainderman would not have been bound. But s. 59 enabled the tenant for life to bind the remainderman and without involving a surrender of the old term.

In *In re Savile Settled Estates* (3), although Maugham J. expressed an opinion that extending the term could operate in law only as a surrender of the old lease and a grant of a new one, it was not necessary to decide the point, nor did the learned judge actually so decide. The question depends upon the intention of the parties. Here the intention is plainly expressed in the extension deed of 1931, that there should be no surrender of the old term. As between tenant for life and remainderman the rights in equity of those parties under the lease have been defined by the testator's will, and there is no evidence of any intention to disturb the rights of the plaintiff

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(3) [1931] 2 Ch. 210.

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Cleveland-Stevens K.C. and *M. G. Hewins* for the defendant, Edmund Brudenell, the infant tenant in tail in remainder. The question does not depend upon the intention of the parties. The plaintiff executed the extension deed in 1931, in exercise of statutory powers conferred by s. 59 of the Act of 1925. In *In re Savile Settled Estates* (3) Maugham J. expressed his view that the exercise of the powers under that section did involve a surrender of the original term. The plaintiff is estopped from saying that there was no surrender. In *Lyon v. Reed* (4) Parke B. said: "If lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former." Again: "All the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus, in the cases which we have adverted to of a lessee taking a second lease from the lessor, or a tenant for life

(1) [1892] 2 Ch. 211.

(3) [1931] 2 Ch. 210.

(2) [1916] 2 Ch. 488.

(4) (1844) 13 M. & W. 285, 306, 307.

accepting a feoffment from the party in remainder, or a lessee accepting a rent-charge from his lessor, it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties."

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[CLAUSON J. That was a question of estoppel as between lessor and lessee. A fictitious surrender is recognized as between those parties. Maugham J. in *In re Savile Settled Estates* (1) deals with the effect at common law of such a deed of variation made under s. 59 upon the relation existing between lessor and lessee. He refers to a statement in Halsbury's Laws of England in vol. xviii., s. 1061, that an arrangement between landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy; and furthermore he says that in his opinion s. 59, sub-s. 1, was not limited to cases where the result of the variation, release, waiver or modification would at common law effect a surrender and regrant. Maugham J.'s observations accord entirely with the passage already cited in argument from Parke B.'s judgment in *Lyon v. Reed*. (2) But why is the remainderman entitled to say that the tenant for life is estopped as against him from showing that, in the circumstances of the case, there has been no surrender?]

The transaction is one depending upon statutory powers. There is a demise as from March 25, 1931. It is not a lease of the reversion. It was a lease to take effect in possession which is only consistent with a genuine surrender of the original term of the old lease; and with that surrender the benefits under the old lease vanished: Woodfall's Landlord and Tenant, 22nd ed., pp. 367, 368. The effect of the extension deed in 1931 being the surrender of the old term and the grant of a new term as from 1931, there is nothing in the will of the testator to exclude the operation of s. 47 of the Settled Land Act, 1925, upon the rents and royalties payable under the new lease. The lease of 1931

(1) [1931] 2 Ch. 210.

(2) 13 M. & W. 285, 306, 307.

CLAUSON J. must found its validity upon the Settled Land Act, 1925. It was a lease to take effect in possession as from March 25, 1931: s. 42, sub-s. 1 (i), Settled Land Act, 1925. The plaintiff cannot, when granting a lease under that Act, reject the provisions of s. 47 as not being applicable to it.

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Topham K.C., in reply, referred to *In re Hanbury's Settled Estates* (1) on the subject of "contrary intention."

Cur. adv. vult.

Nov. 19. CLAUSON J. Lord Robert Bruce died on February 15, 1912, being then entitled to, among other lands, certain beds of ironstone and other minerals. Lord Robert was absolutely entitled to those minerals subject to: (a) a life interest vested in Lady Cardigan, which terminated in 1915; (b) a jointure rentcharge in favour of Lord Robert's widow, which terminated in 1921; and (c) a lease of the minerals in question which had been executed in 1908 and bound Lord Robert and any one claiming title under him. On Lord Robert's death his will became operative and thereunder the beneficial interest in the minerals in question, subject always to the 1908 lease and to the prior interests which I have mentioned, became vested in the late James Brudenell Bruce for life. He died in 1917; on his death his brother, the plaintiff, George Lionel Thomas Brudenell, became, and he still is, tenant for life. His son, the infant defendant, Edmund Brudenell, is tenant in tail in remainder.

In the year 1916 a question was raised whether or not the whole of the rents and royalties payable under, among other leases, that now in question, were payable to the then tenant for life in respect of his life tenancy, and by an order of July 20, 1916, Sargant J. declared that on the true construction of Lord Robert's will the whole of the rents and royalties in question were payable to the tenant for life. That decision, which is, of course, binding on me, means that neither in the provisions of the will nor in any statutes (the

(1) [1913] 2 Ch. 357, 364.

only possibly relevant statutory provision being presumably s. 11 of the Settled Land Act, 1882, which is identical in its terms with s. 47 of the Settled Land Act, 1925), is there anything to be found which derogates from the right of the tenant for life to receive as income the whole of the rents and royalties, but that, on the contrary, what is given to the tenant for life by the provisions contained in the will is the right to receive the whole of the rents and royalties in question.

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In the year 1923 the plaintiff, as tenant for life, and the persons then entitled to the benefit of the lease as lessees or assigns of the lessees, were minded to agree upon a modification of the method of arriving at the royalties. Under the then subsisting Settled Land Acts there was no express power vested in the plaintiff to modify the lease of 1908, though he had power under s. 13 of the Settled Land Act, 1882, to accept a surrender of the lease and grant a fresh lease containing varied provisions as to royalties. No question has been raised in these proceedings as to the operation of the deed which the plaintiff and the lessees executed on November 2, 1923, embodying the modification to which I have referred. The question whether the modifications would bind the inheritance has not arisen. It has never been suggested that that deed operated as a surrender of the lease of 1908, and a regrant for the unexpired period of the lease on the modified terms. It is quite obvious from the tenor of the deed that to construe the deed as amounting to such a surrender and regrant would be to contradict the intentions of the parties; but it may be that, as between the lessees and the plaintiff, the latter may be estopped from denying that the deed so operated. On this point reference may be made to Parke B.'s judgment in *Lyon v. Reed*. (1) I do not, however, know of any authority for the proposition that any one, but the lessee or some one claiming through or under him, could rely on the estoppel as against the plaintiff, and accordingly, had it been suggested that the remainderman could, as between himself and the tenant for life, have relied

(1) 13 M. & W. 285, 305, 306.

CLAUSON on this deed of 1923 as a surrender and destruction of the lease
J. of 1908, I should have been prepared to hold the suggestion
1931 unfounded. The question whether estoppel might operate in
BRUCE, favour of the lessees as against the remainderman, so as to
In re. make the deed one to which the remainderman might have
BRUDENELL to give effect as between himself and the lessees, is a question
v. with which it is not necessary to deal.
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On January 1, 1926, the Settled Land Act, 1925, superseded the former Settled Land Acts. The effect of s. 59 of that Act is to vest in the plaintiff a right to vary the 1908 lease (with, of course, the consent of the present tenants) within certain limits which I do not pause to define. In exercise of this power the plaintiff, on March 25, 1931, entered into an arrangement with the present tenants modifying the lease of 1908 in various respects, and in particular so as to extend the term of the lease beyond the original term. There is no question but that these variations are within the limits of variation laid down by s. 59. There is also no question but that this deed is binding on the plaintiff and on the tenants, and that, as it is within the power conferred on the plaintiff by s. 59, it is also binding on the inheritance and on the tenant in tail. It is further clear, on the face of the deed, that it is the intention of the parties that the lease of 1908 is not to be surrendered and terminated, but is to be kept alive and extended.

As regards rents and royalties accruing in respect of the extended portion of the term, it is suggested on behalf of the tenant in tail—and the suggestion is accepted by the tenant for life as correct—that one-fourth of such rents and royalties must be capitalized, and that the tenant for life will be entitled to retain for himself three-fourths only of those rents and royalties. The argument for the tenant in tail, which is accepted as correct by the tenant for life, is as follows: so far as the new period of years added to the 1908 lease by the deed of 1931 is concerned, the rents and royalties will be payable under the deed of 1931; the deed of 1931 is, as regards this new period, the mining lease, and indeed, as regards these particular minerals, the only mining lease

subsisting ; the rents and royalties arising under it in respect of the new period are accordingly such as are referred to in s. 47 of the Settled Land Act, 1925, and, unless a contrary intention is expressed in the settlement, one-fourth of them must be capitalized, the tenant for life being unimpeachable for waste. This the tenant for life, as I say, accepts, and, indeed, the proposition put forward by the tenant in tail is unanswerable.

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The difficulty arises on a further proposition which the tenant in tail puts forward and which may, I think, be fairly stated thus : True it is that, as Sargant J. decided in 1916, so long as the 1908 lease subsisted, the remainderman could not claim a capitalization of any part of the rents and royalties accruing thereunder ; but, so the argument proceeds, by the action of the tenant for life in executing the deed of 1931, the lease of 1908 has come to an end ; it may be that on the face of the deed it is clear that the tenant for life intended not to terminate the lease of 1908, but to keep it on foot and extend it, but, as a matter of law, so the argument runs, the tenant for life cannot vary the terms of the 1908 lease without in law accepting a surrender of the 1908 lease and granting a new lease in its place.

I will assume first that this argument, so far as it goes, is sound. I still am not convinced that the execution by the tenant for life of the deed of 1931 has had this quasi-magical effect, against every one's intention, of depriving him of one-fourth of the rents and royalties for the rest of the original term of years created by the 1908 lease. The section which occasions this result, if it does occasion it, is s. 47 of the Act. Be it observed, however, that this section operates only "unless a contrary intention is expressed in the settlement." Now I have the decision, unquestionably binding on me, that on the true construction of this settlement, in its application to (among other leases) this particular lease of 1908, the life tenancy carries to the tenant for life, by its own force, the whole of the rents and royalties reserved by the 1908 lease. It results that the application of the provisions of s. 47 to those rents and royalties during the original term of the

CLAUSON 1908 lease would contradict the settlement. For this reason,
 J. as it appears to me, the tenant in tail's submission as regards
 1931 the rents and royalties accruing during the original term of
 — the 1908 lease, fails by reason of the true construction of the
 BRUCE, settlement.
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 BRUDENELL. I may observe that it was not suggested that the variations
 — effected in 1931 operated to increase the revenue of the tenant
 for life at the expense of the tenant in tail. If the variations
 had so operated, the operation of s. 107 of the Act of 1925,
 which places the tenant for life in a fiduciary position in
 relation to the exercise of his statutory powers, would be
 amply sufficient to prevent any detriment to the tenant in
 tail. It is not, however, suggested that on the facts of this
 case any such point could be raised.

But I ought to deal with the further point—namely, the
 question whether the argument put forward by the tenant in
 tail that the deed of 1931 operates as a surrender of the term
 created by the lease of 1908, is valid for any material purpose.
 I will concede for the purposes of the argument that, as
 between the tenant for life on the one hand, and the lessees
 on the other, or even as between all the persons interested
 under the settlement on the one hand, and the lessees on the
 other, the principle of estoppel may prevent any allegation
 that the deed of 1931 operates otherwise than as a surrender.
 But what is the authority which forces me to hold that this
 fiction must be treated as truth as between the tenant for life
 and remainderman? No such authority was cited to me,
 and it is an elementary principle that, as has been picturesquely
 said, “estoppels are odious,” and the principle of estoppel is
 not to be lightly extended; or, to use more modern parlance,
 while established legal fictions must be respected, new legal
 fictions ought not to be introduced. The Settled Land Act,
 1925, by s. 59, has expressly given a power to vary leases
 within certain defined limits. Why should I hold that this
 clear and simple legislative power cannot be exercised without
 operating as between tenant for life and remainderman,
 against everybody's wish and intention, as a destruction
 instead of a variation?

I am, for the reasons I have endeavoured to explain, prepared to declare that the plaintiff, if and so long as his tenancy for life in possession subsists under the settlement, is entitled to the whole of the rents and royalties which accrue under the lease of 1908, as varied by the deed of 1923 and the deed of 1931, during the residue still unexpired of the original term of forty years created by the lease of 1908, but that as from the expiration of the said original term of forty years, one-fourth part of the rents and royalties accruing under the lease as so varied ought to be set aside as capital pursuant to s. 47 of the Settled Land Act, 1925.

I desire to add, in order that I may not seem to have overlooked it, that in view of the possible question on the operation of the deed of 1931, the plaintiff and the lessees entered, also on March 25, 1931, into a contingent agreement for the surrender of the 1908 lease. That agreement is contingent, and so far as I can see, is likely to remain contingent; its existence seems to me to have no bearing on the point which I have decided, and I gathered that all the counsel concerned concurred in this view. I therefore say no more about it.

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Solicitors : *Hopgood, Mills, Steele & Lonsdale ; Hunters.*

H. C. H.

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June 9, 23,
25, 26.

[1931. D. 715.]

Estoppel—Representation—Contract with Proposed Company—Sale by Company—Right of Purchaser to Assign Benefit of Contract to Foreign Company—Incorporation of English Company—Prospectus—Clause referring to Contract with Purchaser—Inducement to Public to subscribe for Shares—Assignment of Benefit of Contract to Foreign Company by Purchaser—English Company's Liability under Clause in Prospectus—Purchaser's Knowledge of Clause—Acquiescence—Representation by Purchaser—Estoppel.

If a person authorizes or permits another to make a representation intended to be acted upon and it is acted upon, that person cannot afterwards be heard to say that the representation is not true.

This applies when the representation is as to the legal effect of a document if there is no qualification in the representation suggesting that the document and not its effect as represented is to govern the relations of the parties.

In a prospectus issued by the defendant company there was a clause referring to an agreement with that company and purporting to set out its effect. The statements in this clause were made with the knowledge and acquiescence of the other party to the agreement, and were also known to and acquiesced in by the duly authorized agent of that party:—

Held, that the contracting party and his agent were thereby estopped from setting up any other construction of the agreement than that stated in the clause in the prospectus.

ACTION.

On February 26, 1929, the defendant company was incorporated under the Companies Acts, 1908 to 1917, with limited liability for the purpose of acquiring certain patent rights relating to an invention known as the Salerni Coupling, which was used in connection with gear changing apparatus in motors.

On the same day the company entered into an agreement in writing, expressed to be made between the defendant company (therein referred to as "the Manufacturer"), of the one part, and one Edward Arthur FitzGerald (therein referred to as "the Purchaser"), of the other part. The agreement contained a recital that the Manufacturer was about to acquire

an invention of one P. M. Salerni, which it was proposed should be known as the Salerni Coupling, used in connection with motor vehicles, and that the Purchaser had requested the Manufacturer to grant to him "the sole right of purchase of Salerni Couplings for sale for all the countries of the Continent of Europe and their Colonies and Dominions, with the exception of Italy and her Colonies and Dominions (thereinafter referred to as the 'said Territories.')" By clause 1 of the agreement it was provided that it "shall remain in force subject as hereinafter provided for a period of fifteen years." Clause 2: "The Manufacturer agrees to sell and to grant to the Purchaser the sole and exclusive right to purchase for sale in the said Territory and the Purchaser agrees to purchase"—subject to a proviso therein mentioned and immaterial to set out so far as these proceedings are concerned—"a minimum of Fifty thousand Salerni Couplings during the first year of this Agreement commencing on the First day of September One thousand nine hundred and twenty-nine and a minimum of One hundred thousand of the said Couplings during the second and subsequent years of this Agreement." There was a further provision, that although Italy was not intended to be included, it was understood and agreed that any couplings sold in Italy, her Colonies and Dominions, were to be deducted from the minimum number, and further there was an option to the purchaser for sixty days to have his rights extended to Italy. Clause 4 of the agreement provided for the price payable for the couplings, and there was a provision as to the amount payable in respect of the minimum number of couplings to be taken in the first year and subsequent years.

The material clause of the agreement was clause 12, which was as follows: "The Purchaser shall have the right to assign the benefit of this Agreement to a Company which he proposes to form with a capital of Seven million French francs of which not less than Six million two hundred thousand francs shall have been subscribed for cash prior to such Assignment and in such event the name of such Company shall be deemed to be substituted for that of the said Edward Arthur

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LUXMOORE FitzGerald in this Agreement." By clause 14 it was provided
 J. that the agreement "is to be construed and take effect as a
 1931 contract made in England and in accordance with the law
 DE of England, and the Purchaser hereby submits to the
 TCHIHAT- jurisdiction of the High Court of Justice in England . . . and
 CHEF the Purchaser elects domicile . . ."

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 LD.
 —

On March 16, 1929, the defendant company issued a prospectus offering for public subscription at par 1,500,000 of the shares of the company at 2s. each. The prospectus contained a paragraph which was headed "Sales Contract for Europe," and was as follows: "The Vendor has procured and the Company has entered into a Contract with Major Edward Arthur FitzGerald, of 38, Green Street, Park Lane, London, W. 1, who is associated for the purposes of this Contract with Messrs. Raymond Saulnier (of Messrs. Morane Saulnier), Clement Bayard, and other leading French Motor Manufacturers, granting the sole and exclusive Selling Rights for 15 years, for all Foreign Countries of the Continent of Europe, their Colonies and Dominions (but only upon special terms as to Italy, her Colonies and Dominions). Under this Contract the Purchaser binds himself to take a minimum of 50,000 Salerni Couplings during the first year ending 31st August, 1930, and a minimum of 100,000 during each subsequent year of the Contract at a price, based upon cost to the Company, including the Vendor's royalty, which should produce a minimum profit of 10 per cent. in the first year, and 20 per cent. in each subsequent year upon the capital issued and under option. A deposit of 12,500*l.* has been paid in respect of the minimum number of couplings to be taken during the first year." Major FitzGerald subscribed, either in his own name or in the name of the plaintiff, a Captain de Tehihatchef (who was a naturalized Englishman), for a large number of these shares.

On April 3, 1929, a French company was incorporated under the laws of France. It was called the Salerni Coupling Société Anonyme, with a capital of 7,000,000 francs, divided into 70,000 shares of 100 francs each. The objects, as set out in the "Statuts," was to deal in the countries of the

continent of Europe, except Italy, and in their colonies and all protected countries, with certain patented apparatus and accessories relating to the motor trade, and in particular with the apparatus invented by the above mentioned P. M. Salerni, and called the Salerni Coupling. By art. 7 of the "Statuts," the capital was to be 7,000,000 francs, divided into 70,000 shares of 100 francs each, all of which were to be subscribed for and paid in cash. Art. 9 prescribed that the nominal value of the shares was to be paid so as to be at least one-fourth on subscription, with the power to pay the total amount by way of anticipation; and the balance at the dates and in the proportions fixed by the Board. According to the French law, the whole of the share capital of the company had to be subscribed at the date before mentioned; that is, the company could not come into existence unless the whole share capital was subscribed; but the subscription might be for cash or for a consideration other than cash.

On November 12, 1929, Major FitzGerald executed a deed of assignment in favour of the above mentioned French company. It was expressed to be made between Edward Arthur FitzGerald (thereinafter called "the Assignor") of the one part, and Société Anonyme Salerni Coupling (thereinafter called "the Assignees") of the other part. The deed contained a recital of the agreement of February 26, 1929, under which the Assignor was given the sole and exclusive right to purchase for sale in the territory therein mentioned a certain number of Salerni couplings upon the terms therein set out, and it expressly referred to para. 12 of the said agreement, which conferred on the Assignor the right to assign the benefit of the agreement to a company which he was then about to form in France with a capital of 7,000,000 francs. It then further recited the formation of the company and an agreement that "the Assignor has agreed with the Assignees to assign the said agreement together with all right and benefit therein to the Assignees in consideration of the covenant on the part of the Assignees hereinafter contained." It provided in clause 1: "In

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LUXMOORE consideration of the covenant on the part of the Assignees contained in paragraph 2 hereof the Assignor doth hereby assign unto the Assignees the said agreement dated the 26th day of February, 1929, and all moneys to become or grow due by or upon any agreement therein contained and all right of action benefit advantage claim and demand whatsoever relating thereto to which thereby the Assignor is in any manner entitled To hold the same said agreement and all other the premises hereinbefore assigned unto the Assignees absolutely. (2.) The Assignees hereby covenant with the Assignor that they the Assignees will perform and observe all the conditions on the part of the Assignor contained in and provided by the said agreement and will indemnify and keep indemnified the Assignor against all actions claims and demands arising thereunder."

On November 22, 1929, the French company by Alfredo Salerni, their managing director, wrote to the secretary of the defendant company stating: "We hereby give you notice that on the 12th inst., by an assignment under the hand and seal of Major Edward Arthur FitzGerald, all the rights and benefits of the agreement between your company and himself were assigned to us, and the liabilities under such agreement have now been taken over by this company." A similar letter was written by Major E. A. FitzGerald on the same day to the defendant company. On November 30, the defendant company wrote to the French company, stating that they received the letter, and the letter contained this paragraph: "The arrangements between your company and Major Edward FitzGerald in respect of his liabilities under the agreement do not concern this company, the responsibility to this company for the liabilities under the agreement of 26th February, 1929, remaining vested in Major FitzGerald. That agreement conferred upon him only the right to assign the benefit of the agreement to a company of a defined capitalisation." A similar letter was written to Major E. A. FitzGerald on the same date by the defendant company, saying: "We are, of course, unaware of the precise nature of the form of assignment but the agreement of 26th February

confers upon you no right to assign the agreement but only the right to assign the benefit of it to company of a defined capitalisation." The position, therefore, at that time was that Major E. A. FitzGerald was claiming to be free from all liability under the agreement of February 26, 1929, and the defendant company was refusing to accept his claim and was insisting that he remained bound. In those circumstances, an agreement dated March 4, 1930, without prejudice to the rights of the parties, was entered into to regulate the relationship of the parties until the issue between them could be decided. Subsequently proceedings were instituted in another division of the High Court, but on January 2, 1931, Major FitzGerald died.

The plaintiffs in the action were his executors, who duly proved his will. On April 1, 1931, the writ in the action was issued, by which the plaintiffs as Major FitzGerald's executors claimed a declaration that they were not liable to the defendant company in respect of the deceased's obligations under the agreement of February 26, 1929, and that by the assignment of November 12, 1929, all Major FitzGerald's liability to the defendant company ceased and his estate was freed and discharged from all liability in respect thereunder.

A. F. Topham K.C. and *Wilfrid H. P. Lewis* for the plaintiffs. It is submitted that one of the first questions for the Court is, what is the precise meaning of clause 12 of the agreement? At the end of the clause, after giving the purchaser the right to assign the benefit of the agreement to a particular company, there occur the words, "and in such event the company shall be deemed to be substituted for that of the said Edward Arthur FitzGerald in this agreement." That must mean that you must read the name of the French company in place of that of the purchaser.

The point has been taken that there arises here an estoppel. As to that the following propositions are submitted: First, under the rules as to estoppel, the representation must be made by the party who is estopped, and secondly, it must

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be made to the party who claims under the estoppel. The question of estoppel was raised in *In re a Bankruptcy Notice*. (1) Further, there must be a statement of fact and not a statement of law : *Beattie v. Lord Ebury*. (2) Fourthly, there is no estoppel where both parties know the true facts, and fifthly, the statements to raise an estoppel must be clear and unambiguous : *Low v. Bouverie*. (3) Lastly, the defendant must have been misled by the statement, and it is not alleged here in the defence that the company was in any way misled. There is no case at all for estoppel here.

Sir Patrick Hastings K.C., Hon. H. Fletcher Moulton, and Hon. Sylvia Fletcher Moulton for the defendants. It is submitted that the plaintiffs cannot now be heard to say that the agreement means anything different from that which is stated in the prospectus. The general principles underlying estoppel cannot be subject to rigid rules. Major FitzGerald must be taken to have authorized the statements in the prospectus and approved of them. He need not have made a deliberate statement as to the truth of the paragraph; a person can be equally estopped by acquiescence and by conduct. It need not be considered to whom the statement, as a statement, was made. To say that there must be a statement of fact is, it is submitted, inaccurate. By sending out this prospectus to the public with these statements, which Major FitzGerald permitted to be published, the defendant company has incurred grave responsibility. It is submitted that in the circumstances here the principle of estoppel applies.

A statement need not be made to any one. The propositions put forward by the plaintiffs cannot be supported by the authorities : see *Carr v. London and North Western Ry. Co.* (4) ; *George Whitechurch, Ld. v. Cavanagh* (5) ; *Jorden v. Money*. (6) It is submitted that there is a Canadian case directly in point—namely, *Calgary Milling Co., Ld. v. American Surety Co. of New York*. (7)

(1) [1924] 2 Ch. 76, 88.

(5) [1902] A. C. 117, 130.

(2) (1872) L. R. 7 Ch. 777.

(6) (1854) 5 H. L. C. 185, 210.

(3) [1891] 3 Ch. 82.

(7) (1919) 3 Western Weekly Re-

(4) (1875) L. R. 10 C. P. 307, 317. ports, 98, 102, 103.

On the question of a permissive acquiescence, see *Gregg v. LUXMOORE Wells* (1), where the remarks of Lord Denman C.J. are relied on. It is submitted that, apart from authority, the principles of estoppel are clear, and each particular case must be considered on its own particular facts. Here Major FitzGerald, by himself or his agent, authorized or permitted the defendants to represent as accurate the facts in the paragraph in the prospectus, and he cannot now be heard to deny that they are true.

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As to the construction of clause 12 of the agreement and the meaning that should be given to a business contract, see the case of *The Moorcock* (2), where Bowen L.J. refers to the principles of construing this kind of commercial contracts, which contain clauses which are express or may be implied.

Hon. H. Fletcher Moulton referred to *Fenner v. Blake* (3) for the remarks of Channell J. on estoppel. This case it is submitted gives an instance of what is a sufficient change of position, and secondly, all the facts there were equally well known to both parties. As to what is a sufficient change in the position of the parties see also *Holt v. Markham* (4), and an older case, *Cave v. Mills*. (5)

Topham K.C. in reply. On the question of estoppel, the representation must be made by the party estopped. It is still submitted that it must be made either by conduct or statement to the person who is a party to an action claiming under estoppel. The cases go very far and are not of very great assistance; compare for instance *In re an Arbitration between Hooley Hill Rubber and Chemical Co. and Royal Insurance Co.* (6), a very strong case as to insurance.

Further, there can be no estoppel where all the parties know the true facts. The statement made must be clear and unambiguous; that is put very fairly in *Low v. Bouverie*. (7)

It is really very difficult to find any rules definitely laid down in the cases. See *Carr v. London and North Western*

(1) (1839) 10 Ad. & El. 90, 98.

(2) (1889) 14 P. D. 64, 68.

(3) [1900] 1 Q. B. 426, 428, 429.

(4) [1923] 1 K. B. 504.

(5) (1862) 7 H. & N. 913.

(6) [1920] 1 K. B. 257, 262, 263.

(7) [1891] 3 Ch. 82, 113.

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It is submitted that on the whole of the facts and the evidence in this case the doctrine of estoppel is inapplicable.

LUXMOORE J. The plaintiffs in this action are the executors of a Major Edward Arthur FitzGerald, who died on January 2, 1931, and they are seeking a declaration that by an assignment dated November 12, 1929, by Major Edward Arthur FitzGerald to a French company, called the Salerni Coupling Société Anonyme, all liability of the said Edward Arthur FitzGerald to the defendant company in respect of an agreement dated February 26, 1929, ceased, and his estate was freed and discharged from any liability in respect thereof. The material facts appear to be as follows. [His Lordship stated the facts as substantially set out above.]

The questions which fall to be determined are these: First, what is the true construction of the agreement? Was it open to Major FitzGerald to free himself from all future liability under it by assigning the benefit of it to the French company, assuming that the French company fulfilled the requirements of clause 12 of the agreement; or was Major FitzGerald's only right to assign the benefit, he remaining liable to the defendant company for the fulfilment of the liability imposed upon him by it? Secondly, assuming that on the true construction of the agreement Major FitzGerald can free himself from liability, has he in fact done so by the assignment that he has made, (a) having regard to the nature of the French company, and (b) having regard to the terms of the assignment to them; and, thirdly, assuming all these questions are answered in favour of the plaintiffs, are they precluded from relying on the construction of the agreement, having regard to the statement made in the prospectus? In other words, are the plaintiffs estopped by reason of the representations made in the prospectus

(1) L. R. 10 C. P. 307, 316.

(3) 10 Ad. & El. 90.

(2) [1902] A. C. 117, 124, 129.

(4) (1848) 2 Ex. 654, 662, 663.

(5) [1900] 1 Q. B. 426.

as to the liability of Major FitzGerald under it, and the conduct of Major FitzGerald and/or the plaintiff, Captain de Tchihatchef, with regard to these representations ?

The material facts with regard to the representations are these : Major FitzGerald was interested in the incorporation of the defendant company and in the public issue of a million and a-half of its shares which were subsequently offered to the public. His interests arose in two different ways. He was a subscriber for a large number of shares, and he was to become an underwriter of a large number of those shares which were to be offered for public subscription. He subscribed for shares and became an underwriter in his own name and in the name of the plaintiff, Captain de Tchihatchef, who was at all material times his secretary and business representative. The offer of the shares to the public was made through a company called the Scottish Finance Company, Ltd., of which a Major Beckwith was a director, and who was also a director of the plaintiff company and had in hand the work of preparing the prospectus. On February 15, 1929, a Mr. Kennedy, managing clerk to the firm of solicitors, Messrs. Ernest Salaman, Wade & Co., who were acting for the company in the preparation of the prospectus, prepared a statement as to the contract of February 26, 1929, for insertion in the prospectus. That statement was that the company had entered into a contract with Major FitzGerald, representing important French motor manufacturing interests, "granting the sole and exclusive selling rights for 15 years, for all foreign countries of the continent of Europe, their Colonies and Dominions (but only upon special terms as to Italy, her Colonies and Dominions). Under this contract the purchaser binds himself to take a minimum of 50,000 Salerni Couplings during the first year ending 31st August, 1930, and a minimum of 100,000 during each subsequent year of the contract at a price, based upon cost to the company, including the vendor's royalty, which should produce a minimum profit of 10 per cent. in the first year, and 20 per cent. in each subsequent year upon the capital issued and under option.

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LUXMOORE A deposit of 12,500*l.* has been paid in respect of the minimum number of couplings to be taken during the first year." That statement was inserted in the proof prospectus of February 16, 1929, and, I think, in some of the subsequent proofs. On February 21, a proof of the prospectus was submitted to Counsel (the late Mr. B. A. Hall) for settlement. The paragraph which I have just read stands in the draft, Mr. Hall's note against it being: "I assume the company to be in a position to carry out this contract." On February 25, 1929, the draft was again submitted to Mr. Hall, and on that draft he made certain alterations. He altered the paragraph so that it read: "The company has entered into a contract with Major FitzGerald, who is associated with important French motor manufacturing interests granting the sole and exclusive selling rights for 15 years, for all foreign countries of the continent of Europe, their Colonies and Dominions (but only upon special terms as to Italy, her Colonies and Dominions). Under this contract the purchaser"—he struck out the words "selling organisation" and put "the purchaser"—"binds himself to take a minimum number of . . . couplings" and so on. I need not refer to the rest of the paragraph because no material alteration is made. From time to time there were further alterations made and further proofs obtained, but there was no material alteration in the clause which is headed "Sales Contract for Europe," and the shares were offered for public subscription according to it. The evidence establishes to my satisfaction that the alterations made in the particular clause were brought to the notice of Captain de Tchihatchef and Major FitzGerald. The clause was a most important and a most attractive one from the public point of view, because it showed that there was apparently a responsible person in touch with certain well-known French motor traders bound for a period of fifteen years to take such a number of the defendants' couplings as would ensure a dividend on the capital of the company issued and under option of 10 per cent. for the first year and 20 per cent. for each of the subsequent fourteen years.

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Captain de Tchihatchef, one of the plaintiffs, was called as a witness by Mr. Topham. [His Lordship considered the evidence of the witness elicited in the course of his cross-examination as to his (the witness's) understanding of the clause in the prospectus of the defendant company headed "Sales Contract in Europe," and to what extent he had discussed it with Major E. A. FitzGerald.] That evidence of Captain de Tchihatchef is, I think, really corroborated by what another witness, Major Beckwith, said in the witness-box. He said that the proofs as they came in from time to time were sent to all those who were interested in the underwriting, that he had discussed them with Captain de Tchihatchef, and some of the drafts were probably sent direct to Major FitzGerald. From the evidence I am satisfied that both Captain de Tchihatchef and Major FitzGerald were fully aware of the statement contained in the paragraph, "Sales Contract for Europe," as finally agreed and drafted and that no objection was ever taken by them or either of them to it.

Now a question arises as to the legal effect of their acquiescence in this paragraph. The paragraph appears to me to contain a statement of fact that under the agreement therein referred to, Major FitzGerald is bound to take so many couplings for a fixed period of fifteen years, and consequently there will be a certain dividend of 10 per cent. in the first year and 20 per cent. in each subsequent year. There is no suggestion that Major FitzGerald can terminate his liability at any time by transferring the right to take the couplings to a third party who might or might not be bound to the company. The statement is a definite statement as to the position resulting from the contract. It was made to the knowledge of Captain de Tchihatchef and Major FitzGerald for the purpose of obtaining public subscriptions and with the knowledge that the company intended to make the offer on the faith of that statement. If the representation was not in fact true, the company would or might be liable to those who subscribed and underwrote the shares.

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Mr. Topham has sought to lay down a number of precise rules as to what constitutes an estoppel. I doubt whether it is possible to achieve what he has attempted. As Lord Macnaghten said in the case of *George Whitechurch, Ltd. v. Cavanagh* (1): "The doctrine of estoppel by representation is a very old head of equity. It has been discussed not unfrequently in this House, notably in the case of *Jorden v. Money* (2), to which Lord Selborne was constantly in the habit of referring. It is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that I sometimes rather doubt whether any great advantage is to be gained by endeavouring to reduce it to rules such as those which have been formulated in the case of *Carr v. London and North Western Ry. Co.* (3)" Bearing in mind that injunction, and without attempting to formulate any precise rules, it seems to me that it is sufficient, so far as this case is concerned, to say that if a person authorizes or permits another to make a representation for the purpose of it being acted upon and it is acted upon, that person cannot afterwards be heard to say that the representation is not true. This applies even if the representation is as to the legal effect of the document, if there is no qualification in the representation suggesting that the document and not its effect as represented is to govern the relationship of the parties.

My attention has been called to a number of cases. It is not from any disrespect to those cases or to counsel's argument that I do not refer to them expressly. I think I have stated, so far as is sufficient for this case, the general result of those cases in what I have already said. There is however one case which is for practical purposes almost the same as the present one. It is a case which was before the Privy Council in 1919, *The Calgary Milling Co., Ltd. v. The American Surety Co. of New York*, and is reported in the Western Weekly Reports (4), which contain "All Judgments

(1) [1902] A. C. 117, 130.

(2) 5 H. L. C. 185.

(3) L. R. 10 C. P. 307.

(4) (1919) 3 Western Weekly
Reports (Canada), 98, 102, 103.

of value delivered by and originating in the Courts of Alberta, British Columbia, Manitoba and Saskatchewan." The facts in that particular case are as follows: There was a building contract for a lump sum, and it provided that the contractor should be paid by the building owner in instalments for labour and materials upon production of certified accounts. The agreement provided that the total amount so paid during the progress of the work should not exceed a sum equal to 80 per cent. of the work done and materials furnished on the premises at the contract price. The owner was authorized to retain out of the moneys payable to the contractors the sum of 20 per cent. of the amount of the contract work, and to retain such 20 per cent. until thirty-one days after the completion of the work. That contract was open to two constructions: First, must the owner pay the full amount certified until the total amounts paid by him reached 80 per cent. of the total sum, or must he deduct 20 per cent. from each instalment certified? The Court held that the former was the true construction. The contractors' performance of the contract was guaranteed by a surety; the suretyship bond provided that the owner's right of recovery under the bond was conditioned on the owner faithfully performing the contract and retaining all he might retain under it, and the owner, having in fact deducted 20 per cent. from each of the certified amounts, had throughout paid the contractor less than he ought to have received on what the Court held to be the true construction of the contract. The surety in the action sought to rely on that fact as relieving him from his liability under the bond. It was proved that, before the deductions were made, the owner had written to the surety asking his view as to the meaning of the particular provision. The material letter is set out at p. 102 of the report. So far as material, it is this: "Referring to your 30,000 dollar surety bond, Tromanhauser and Mooers [building contractors], Principals, and ourselves, Obligee, dated August 10, 1910, and our agreement with these contractors in connection with the same dated July 18, 1910—a copy of which we presume you have retained—would say that the contractors claim

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that section three of clause fourteen of this agreement binds us to pay them after our acceptance of the bond, 100 per cent. or in full for all paid vouchers produced for work done and material supplied on the building ; up to a point where we have paid them 80 per cent. of the contract price of 52,000 dollars ; after which all payments cease until thirty-one days after the completion of the contract to our satisfaction, when final payment will be due then. Now, it appears to us that the wording of this section of clause fourteen is rather ambiguous, and you may have interpreted it as binding us to pay them not more than 80 per cent. of the amount of such paid vouchers ; up to a point where we will have paid them 52,000 dollars, or 80 per cent. of the contract price after which all payments cease, until they are entitled to their final payment. It is agreeable to us to make these payments in accordance with the interpretation of the contractors, providing we will not thereby be invalidating your bond. Kindly let us know how you have interpreted this clause, and what, in your opinion, is our obligation to you in respect to same." In answer to that the sureties wrote acknowledging the letter and saying that they desired to state that, after carefully reading over the contract, their company was of opinion that payments to be made to the contractors should be on an 80 per cent. basis, that is, 20 per cent. of every payment should be retained until the final completion and acceptance of the work. So that the surety took the view of the construction of the contract which the Court held to be wrong, yet the Court held that the contractors could not rely on any breach of the original contract by the building owner in so far as he had not paid the contractors in full. Lord Dunedin, in delivering the judgment of the Board, said : " Their Lordships are of opinion that this argument is not open to the appellants in respect that they are estopped by their letter of September 13, 1910. On what their Lordships have held to be the true construction of the contract, the contractors might, it is true, have insisted on the full certified payments up to the total limit, but inasmuch as the respondents put the matter

fairly to the appellants, and in acceptance of their view only paid the 80 per cent., it is impossible for the appellants to found on that as a breach of contract on the respondents' part."

In my view, the representation made by the prospectus as to the effect of the agreement of February 26, acquiesced in, as I hold it was, by Captain de Tchihatchef as agent for Major FitzGerald, and by Major FitzGerald himself, creates an estoppel that precludes the plaintiffs, as Major FitzGerald's legal personal representatives, from setting up any other construction of the agreement in question.

That would be sufficient to dispose of the case, but as the matter has been fully argued I think it is right that I should deal with the other points which have been raised. The first is, I think, as to the construction of the agreement itself. It is said that, on this agreement, if the benefit were to be assigned by Major FitzGerald to a company which fulfils the conditions and restrictions set out in clause 12, then and in this event Major FitzGerald was freed from all liability under the agreement. The question whether that is the right construction depends on the actual provisions of the agreement. The agreement provides that Major FitzGerald is liable for fifteen years to take a specified number of coupplings at a specified price. He is to be the sole selling agent in the particular territories named for that period, and he is to have the sole right to sell them. Clause 12 of the agreement is the material clause, and it provides that the purchaser shall have the right to assign the benefit of this agreement to a company which Major FitzGerald should form, with a capital of 7,000,000 French francs, of which not less than 6,200,000 francs shall have been subscribed for in cash before the assignment. Those are the words on which Mr. Topham relies as showing that, in the event of this assignment, Major FitzGerald was to be absolutely freed from any liability. The agreement then goes on: "and in such event the name of such company shall be deemed to be substituted for that of the said Edward Arthur FitzGerald in this agreement." It is to be noted that it does not say

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LUXMOORE that it is to be substituted for him so as to free him from any liability, or anything of that sort. If it means that by the assignment of the benefit of the agreement to the French company, Major FitzGerald is under no liability—and of course the French company is not in any sense in contractual relationship with the company who entered into the agreement—it would result in no one remaining bound to the company at all. All it would mean would be that the French company would have the benefit of the agreement; they could, if they wished, purchase the particular couplings and so on, and act as sole agents for the company; but if they did not take any of the couplings, the Salerni Coupling, Ltd., would have had no power on that basis to enforce anything against them. It would be a very extraordinary result.

I think that when you read this agreement and consider the whole position between the parties, the true construction is that the purchaser is to have the right to assign the benefit of the agreement to the French company, and that, so far as the benefit is assigned, then and in that event and for the purpose of giving Major FitzGerald the benefit of the assignment which he has made, the name of the company is to be substituted for that of Major Edward Arthur FitzGerald and for no other purpose. There is nothing to suggest that the liability of Major Edward Arthur FitzGerald is to be determined on the assignment in any way. On the whole I think the true construction is that the power is to assign the benefit and, on the assignment of the benefit, Major Edward Arthur FitzGerald still remains liable under the agreement.

Then it is said that the company which has been formed is not a company which fulfils the conditions of this agreement. The company which has been formed has a capital of 7,000,000 French francs. The whole of that capital has been subscribed, and subscribed for in such a way that the whole amount of it is payable in cash, none of it being payable for a consideration other than cash. It is said by Sir Patrick Hastings that the company does not fulfil the conditions because, on the true meaning of this contract, “subscribed

for cash prior to such assignment" must mean that the company has in fact received the whole 6,200,000 francs in cash before the date of the assignment. I do not think that that is the true meaning of the contract. The phrase "subscribed for in cash" is a phrase which is well recognized in business transactions with regard to limited companies; it is used in contradistinction to a subscription for consideration other than cash. So long as the subscription is for cash, I do not think it is material to consider whether the payment has in fact to be made in full before the date of the subscription; the amount could be called up at any time. The other point which Sir Patrick Hastings made was that the assignment itself did not operate as an assignment within the meaning of this agreement. So far as I read the assignment, it is an assignment of every benefit which is to accrue to Major FitzGerald under the agreement, and in my view the assignment itself, apart from any other question, is an assignment within the meaning of clause 12.

The result of my decision is that the plaintiffs' claim for a declaration that the estate is not under any liability fails, and with the usual consequences.

Solicitors: *Gordon, Dadds & Co.; Ernest Salaman, Wade & Co.*

A. R. T.

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The rectory of a parish, the rector of which, after having been instituted thereto with cure of souls, was on the same day also instituted, on his own presentation as rector, to the vicarage thereof with cure of souls, and on March 31, 1927 (the appointed day) was still both the rector and the vicar, is not a rectory with cure of souls within the meaning of the Tithe Rentcharge (Rates) Act, 1899, and therefore is not a "benefice" within the meaning of the Tithe Act, 1925. Therefore the tithe rentcharge attached to such a rectory does not vest in Queen Anne's Bounty under s. 3 of the Tithe Act, 1925, so as to entitle the rector in respect of his rectorial tithe rentcharge to any of the relief from payment of rates conferred by that Act.

WITNESS ACTION.

In this action the Rev. Henry Morris Greening, as the incumbent of the parish of Gestingthorpe in the county of Essex, sought a declaration that by virtue of the Tithe Act, 1925, the rectorial tithe rentcharge, which immediately before the appointed day referred to in that Act—namely, March 31, 1927, was attached to his benefice, became vested in the defendants, Queen Anne's Bounty, for all his interest therein so attached and for the purposes of that Act.

On November 9, 1917, the plaintiff, on the presentation of Jervase Paget Elwes the patron, was instituted and inducted by the Bishop of the diocese to the rectory of the parish of Gestingthorpe, and on the same day was instituted and inducted to the vicarage of the same parish, of which he was the patron by virtue of his rectory, and to which he had offered himself for institution. Upon both occasions there was committed by the Bishop to him, first as rector and next as vicar, the cure of the souls of the parishioners.

From the time of his institution up to the appointed day the plaintiff continuously resided in the parish and performed

his spiritual duties there. Immediately before the appointed day, the tithe rentcharge attached to the rectory and receivable by the plaintiff was, at the commuted value thereof, about 516*l*. As from the date of his institution until March 31, 1927, the plaintiff received in respect of his rectorial tithe rentcharge the relief from payment of rates given by the Tithe Rentcharge (Rates) Act, 1899.

The plaintiff alleged that under the Tithe Act, 1925, on March 31, 1927, the rectorial tithe rentcharge was transferred to and vested in the defendants for all the interest therein attached to the benefice in trust for him, the plaintiff, as incumbent of the benefice, with the consequent relief to him from payment of rates prescribed by s. 7, sub-s. 1, of that Act.

The defendants denied that the benefice of the rectory of Gestingthorpe was a benefice within the definition thereof referred to in the Act of 1925, and denied that the plaintiff had at any time since his institution on November 9, 1917, been the rector of that parish with cure of souls. They alleged that at all material times the rectory had been without cure of souls. They alleged, alternatively, relying on the statutes against pluralities, that when the plaintiff was instituted to the vicarage he ipso facto vacated the rectory, and, in any case, ceased as rector to have any cure of souls or, alternatively, cure of souls "actualiter." Further, they admitted that the rectorial tithe rentcharge attached to the sinecure rectory of Gestingthorpe was, before the appointed day, receivable by the plaintiff as sinecure rector but denied that any part of that tithe rentcharge was attached to the benefice of the vicarage. Further, they alleged that the relief alleged by the plaintiff to have been received by him under the Tithe Rentcharge (Rates) Act, 1899, in respect of rectorial tithe rentcharge was given improperly.

The question for the determination of the Court was whether the rectory to which the tithe rentcharge was attached was a "benefice" within the meaning of the Tithe Act, 1925.

The material part of s. 3, sub-s. 1, of the Tithe Act, 1925, is as follows: "Any tithe rentcharge which immediately

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before the appointed day is attached to a benefice shall on that day be transferred to, and by virtue of this Act become vested in, Queen Anne's Bounty for all the interest therein so attached." By s. 24, sub-s. 1: "The expression 'benefice' has the same meaning as in the Tithe Rentcharge (Rates) Act, 1899"; and by s. 2, sub-s. 1 (b), of that Act: "The expression 'benefice' includes all rectories with cure of souls, vicarages, perpetual curacies, endowed public chapels and parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed, or reputed to be annexed, to any church or chapel, and districts formed for ecclesiastical purposes by virtue of statutory authority, and includes benefices in the patronage of the Crown or of the Duchy of Cornwall." By s. 7, sub-s. 1, of the Tithe Act, 1925: "The amount of any rate made on or after the appointed day which is assessed on the owner of any tithe rentcharge which is vested in Queen Anne's Bounty under this part of this Act shall not be payable by such owner, but shall, on demand being made by the collector of the rate on the surveyor of taxes for the district, be paid by the Commissioners of Inland Revenue."

F. H. L. Errington and *E. W. R. Peterson* for the plaintiff. On the appointed day the rectory of Gestingthorpe was a rectory with cure of souls within the definition contained in s. 2, sub-s. 1 (b), of the Act of 1899. Before 1849 the rector and the vicar were generally different persons. Since 1849, the rector and vicar of that parish have always been the same person and having the entire cure of the souls of the parishioners. In the case of a rectory impropriate, the cure of souls is committed by institution to the vicar. Such a rectory is a true sinecure. Again, in the case of donatives there was no presentation and no institution. The rectory was donated, and, by reason of lack of institution, was a sinecure rectory. Donatives were abolished by s. 12 of the Benefices Act, 1898, and made presentative, thus necessitating institution. Peculiars, being exempt from the Bishop's jurisdiction, were much on the same footing; the holder of

such a benefice, not having been instituted, had not a cure of souls, although he was responsible to the Bishop for the cure. The benefice was again, strictly speaking, a sinecure. Institution is, in fact, the test of a cure of souls. Here the plaintiff was instituted by the Bishop and had committed to him, in so many words, the cure of souls. How, then, can such a rectory be a sinecure? True, the plaintiff was also instituted as his own vicar. He officiates in a double capacity and holds concurrent spiritual offices. A rector who has appointed a vicar retains the cure of souls in law by virtue of his original institution: see Phillimore's Ecclesiastical Law, 2nd ed., p. 381, s. 4—Sinecure. The plaintiff had to make the declaration required by the Clerical Subscription Act, 1865, and had to read himself in. Institution by the Bishop is the act by which the cure of souls is committed to the incumbent: Phillimore, p. 350, s. 8. In those few ancient parishes where there were a rector and a vicar instituted, formerly the rector had to reside; he was the principal spiritual pastor and had a cure of souls, while the vicar had the main exercise of the cure: "Nam habitu et quoad proprietatem cura est penes rectorem principatem, sed quoad exercitium et effectum est penes vicarium": Lyndwood, Provinciale, 1679, p. 132; Canon of John Peccham, note (g); Johnson's Clergyman's Vade Mecum, 1731, 6th ed., p. 67. This is often expressed as the rector having the cure "habitualiter" and the vicar "actualiter." In any case a parson has a concurrent cure with his vicar, and coming in by admission, institution and induction, the vicar cannot discharge him from the cure of souls: *Heath v. Pryn.* (1) The Bishop has the cure of souls of the whole diocese, and by institution transfers it quoad the parish to the parson, so that, prima facie, he who is instituted has the cure: the vicarage is derived out of the parsonage. When the rector and the vicar are different persons, the authorities show that they have concurrent cures: *Heath v. Pryn.* (2) Supposing a rector having the

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(1) (1670) Vent. 14, 15. *Clarke v. Pryn*, Sid. 426; *Clerke v.*
(2) Vent. 14; also sub nom. *Heath*, 1 Mod. 11, Case 35.
Clerke v. Prinn, 2 Ke. 484, 556;

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sole cure of souls were inhibited and a curate were appointed, the curate would then have the cure "actualiter" and the rector would have it "habitualiter"; but it could not be said that the rector held a sinecure. The vicar is only the vicegerent of the rector or parson: see Degge's Parson's Counsellor, 1820, p. 241; and when the parson has committed to him by the Bishop the cure of souls he cannot transfer the cure to his vicar. "Sinecure" has a purely artificial meaning: when a rector in these cases has the permission of the Bishop to be non-resident, it has, no doubt, become the custom to describe his position, in popular language, as a sinecure. Here the plaintiff, occupying the position he does of both rector and vicar at the same time, residing in the parish and carrying out the active duties of the cure, must possess the cure of souls "actualiter." The Act 2 & 3 Vict. c. 30, which enables the Bishop to apportion the spiritual duties where there is more than one spiritual person instituted, would apply to this case, if the rector and vicar were different persons. It must follow that an incumbent who combines both offices has the cure as rector, though also as vicar. The Act does not apply only to medieties, if indeed it applies to them at all. The case of *Heath v. Pryn* (1), in its various branches, shows conclusively that the rector in these cases has a cure of souls independently of the vicar. As to plurality: this case is not within the mischief aimed against by the statutes against pluralities from the statute 21 Hen. 8, c. 13, to 48 & 49 Vict. c. 54. The policy of those Acts was to prevent one incumbent from holding more than one cure of souls, except upon the conditions laid down in those Acts. Here the plaintiff has one single cure. The tests of distance and population applied by those Acts point clearly to separate benefices with their own separate cures of souls. But, whatever the construction of those statutes, they are no guide for the purpose of the Tithe Act, 1925. An incumbent who has the entire cure of souls in one parish cannot be a pluralist. As to further legislation which may be cited against my argument, the

(1) Vent. 14.

Act 3 & 4 Vict. c. 113, which was based upon the fourth report of the Commissioners, no doubt, provided for the suppression of sinecure rectories. No church where there is but one incumbent is properly a sinecure : Johnson's Clergyman's Vade Mecum, 6th ed., p. 91. The plaintiff, having been instituted to the rectory, has the cure of souls, whether he resides or not : Phillimore, p. 350. When a rector is excused residence, his rectory is popularly called a sinecure ; but the question is whether it is, even in those circumstances, a sinecure from a legal standpoint. The text writers base sinecure on non-residence : Phillimore, p. 381. The circumstances at the particular date must be considered ; and, if a rector is non-resident, then for the purpose of the Act, 3 & 4 Vict. c. 113, the rectory may be a sinecure ; but, if he is resident, he has the cure of souls. Here the plaintiff was instituted and has always been resident ; indeed, since 1849 the rectors have been resident. On the appointed day under the Tithe Act, 1925, the plaintiff was rector with cure of souls.

Wilfrid H. P. Lewis for the defendants. This is a sinecure rectory. If it is, the plaintiff is entitled to hold the rectory and the vicarage together. If it is not, then the plaintiff, on becoming vicar, ipso facto vacated the rectory : 1 & 2 Vict. c. 106, s. 11. There is plenty of evidence of the existence of sinecure rectories. There are a number of statutes concerned with rectories with cure of souls, from which it follows that there exist rectories without cure of souls. Even after the abolition of donatives by the Benefices Act, 1898, statutory provision is to be found relating to rectories without cure of souls : s. 12 of that Act provides for a donative benefice with cure of souls becoming presentative ; and by s. 13, the expression " benefice " includes all rectories with cure of souls : by s. 1 of the Union of Benefices Act, 1860, provision is made for the union of a benefice or contiguous benefices with one or more spiritual sinecure rectory or rectories, vicarage or vicarages. Sect. 4 of the First Fruits and Tenths Measure, 1926, refers to a " sinecure rectory " permanently annexed to a benefice. In all

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appropriations there is generally a spiritual person attached to the same church under the name of vicar, to whom the spiritual duty or cure of souls belongs, in the same manner as in parsonages not appropriated (or rectories) to the rector : Stephen's Laws relating to the Clergy (1848), vol. ii., p. 1369, and general summary of the law respecting rectors and vicars at pp. 1370, 1371. Some text-books attempt to draw a distinction between a cure of souls "habitualiter" and "actualiter." A rector who has appointed a vicar and ceases to officiate himself may still have left in him a spiritual duty called "habitualiter," but such a rector cannot properly be said to possess the cure of souls, which is in the vicar "actualiter." A parsonage and vicarage are two distinct benefices ; the parson and vicar both have "curam animarum," the parson "habitualiter," the vicar "actualiter." Here, if the rectory and vicarage are treated as two distinct benefices, they may be held together by the plaintiff, only if the rectory is a sinecure. Once the rectory becomes a sinecure, it cannot afterwards become one with cure of souls. From 1588 to 1591, one Peter Wentworth was both rector and vicar, but in 1591 he ceased to officiate as vicar and a new vicar was appointed, while Wentworth continued as rector until 1599, presumably doing no duty. If a rectory has once become a sinecure, as this rectory did at least in 1591 if not before that date, it cannot subsequently become one with cure of souls by the return of the rector to residence and the resumption of his spiritual duties. By 3 Geo. 4, c. 72, provision is made (s. 13) for the conversion of vicarages into rectories where the owner of an impropriate rectory entitled in fee simple or the patron entitled in fee simple of a sinecure rectory and also the incumbent of a sinecure rectory should be willing to restore and release and re-unite the tithes and glebe and all other rectorial rights and emoluments to the incumbent and his successors. Then the Ecclesiastical Commissioners Act, 1840 (3 & 4 Vict. c. 113), by s. 48 provides for the suppression of sinecure rectories ; and by s. 55 provides, in certain circumstances, for the annexation of the tithes and endowments belonging to a

rectory without cure of souls to the vicarage dependent on such rectory and incompetently endowed. Here the cure of the plaintiff as rector is only "habitualiter," which in the eye of ecclesiastical law renders his rectory a sinecure. The expression "benefice without cure of souls" referred to in the Acts against Pluralities and the Tithe Act, 1925, cannot be construed in different senses. Presentation, institution, and induction were the methods of obtaining possession of sinecure rectories: Phillimore, p. 382; Johnson's Clergyman's Vade Mecum, p. 92. There is a certain amount of documentary evidence that Gestingthorpe was considered to be a sinecure: see the Bishops' Act books for the years 1832, 1846, 1849 and 1887; the Second Report of the Church Commission of 1885, which advises the suppression of sinecures. The Fourth Report does not detract anything from what the Second Report said on the subject of sinecures. In 1888 the Rev. Mr. Bromich made a return to the Ecclesiastical Commission in which he described Gestingthorpe as a sinecure rectory: and in 1918 the Registrar describes the transfer of the rectory to the plaintiff as a fee simple sinecure.

Errington in reply. It is not the case that the plaintiff is placed in a dilemma. The benefice is not a sinecure; and, although it is one with cure of souls, the case is not one which is hit by the Pluralities Acts, which are aimed against the holding of two or more distinct and separate benefices each having a cure of souls. The expression "benefice" in the Tithe Act, 1925, does not include a sinecure benefice, that is, a benefice without cure of souls. It does include every benefice with cure of souls, however the cure may be technically described. The benefice of Gestingthorpe was on the appointed day under the Act one with cure of souls. In the case of an appropriation of a rectory to a spiritual corporation aggregate, the corporation was actually discharged from the cure of souls and the cure was in the vicar: but, when both rector and vicar are instituted, there can be no such discharge of the rector; and, if the plaintiff were to resign the vicarage, he would still continue to be the rector with cure of souls. It may well be that his interest is an interest lasting only

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during his incumbency, it is something less than a fee simple : in such case, s. 12 of the Tithe Act, 1925, applies and vests the tithe in Queen Anne's Bounty, so long as the plaintiff is the rector. On his death or retirement, it may or may not continue so to be vested : it depends on his successor. The section does not require in such cases the sinking fund payment nor is there ultimate redemption ; and the present case is exactly provided for. The 3 & 4 Vict. c. 113, ss. 48 and 55, are dealing with rectories where there is a separate vicar doing the duties of the cure. Here, the rector is the sole parson doing the duty. He is obliged to reside, unless he has obtained a dispensation from residence ; and, while he is resident, he is bound to perform his spiritual offices. It is non-residence which causes a sinecure : Phillimore, p. 381 ; Lyndwood, Provinciale, p. 132, note (g). There are various references in eighteenth century documents to Gestingthorpe rectory as a sinecure ; but it is possible and quite probable that the rector was non-resident. On occasions before 1849, and ever since that year, the rectory and the vicarage have been held together by the same resident incumbent. To justify at all the use of the term " sinecure," non-residence must be proved. Here, the rectory and the vicarage are held together as one incumbency. The plaintiff, residing in the parish of which he is both the rector and the vicar, has the sole and entire cure. He has, for all practical purposes, united the rectory with the vicarage and has restored the rectory to the normal position of a rectory with its own resident incumbent, a rectory with an effective cure of souls.

CLAUSON J. stated the material facts, and continued : If it be true to say that the plaintiff was on March 31, 1927, the appointed day, the rector with cure of souls of the rectory of the parish of Gestingthorpe within the meaning of s. 2, sub-s. 1 (b), of the Tithe Rentcharge (Rates) Act, 1899, he succeeds in establishing that the tithe rentcharge attached to that rectory vested on that day in Queen Anne's Bounty, with the result that he is entitled to the relief from rates given by s. 7 of the Tithe Act, 1925. There is no question but

that the plaintiff is the vicar of the parish with cure of souls. That is plainly shown in the instrument of his institution on November 9, 1917. But on the same day that he was instituted to the vicarage he was previously, upon the presentation of Mr. Elwes, the patron, instituted to the rectory of the same parish of Gestingthorpe with cure of souls. It is on that ground that he claims that the rectory is a rectory with cure of souls and therefore, by reason of the terms of s. 2, sub-s. 1 (b), of the Tithe Rentcharge (Rates) Act, 1899, falls within the definition of a "benefice" contained in the Tithe Act, 1925.

It appears from Newcourt's Repertorium, London, 1710, that Gestingthorpe was then in the diocese of London and that there was there what Newcourt describes as "a rectory a sinecure, and a vicarage." The lists of rectors and vicars began in the fourteenth century. From 1588 to 1591 and from 1665 to 1668, and again, as I am told, from 1849 down to the present time, the rectory and vicarage were held together by the same spiritual person. At all other times the rectory and vicarage were held by separate spiritual persons.

As regards the origin of and incidents attaching to such rectories as that of Gestingthorpe—namely, rectories unappropriated, and therefore to be held by spiritual persons only, but with a vicarage endowed, I will read two passages from Phillimore's Ecclesiastical Law, 2nd ed. : the first is at p. 381, and runs as follows: "The origin of sinecures was thus: The rector (with proper consent) had a power to entitle a vicar in his church to officiate under him, and this was often done; and by this means, two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of sinecures, by having been long excused from residence, are, in common opinion, discharged from the cure of souls (which is the reason of the name), and however the cure is said in the law books to be in them 'habitualiter' only, yet, in strictness, and with regard to their original institution, the cure is in them 'actualiter,' as much as it is in the vicar."

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The second passage is at p. 382 and is as follows : " Possession of sinecures (not being exempt as is aforesaid) must be obtained by the same methods by which possession of other rectories and vicarages is obtained, namely, by presentation, institution and induction. And the reason is, because the vicarage had not its beginning by appropriation and endowment (which was a discharge to the parson from the cure), but by intitution, that is, by being admitted to a title, or a share in the profits and cure of the rectory, together with the rector, and in subordination to him as vicar. For although by a constitution of Archbishop Langton there might not be two rectors or parsons in one church, yet there might be, and sometimes were, established in the same church both a rector and vicar with cure of souls ; and in such case, the rectory came to be a sinecure, not because it was really so in law, but because the rectors got themselves excused from residence, and by degrees devolved the whole spiritual cure upon the vicars. Upon which ground, the possessors of sinecures were not bound to read the Thirty-nine Articles by 13 Eliz. c. 12. And in this only, institution to sinecures differed from institution to other benefices. Sinecures are not within the Act 1 & 2 Vict. c. 106, as they were not within the old Act against pluralities, such livings being not by the said statute deemed incompatible ; but only those to which the cure of souls is actually and not only habitually annexed." To the same effect is a passage in Stephen's *Laws Relating to the Clergy* (1848), vol. ii., p. 1371 : " It is to be observed also, as another anomaly in the law of vicarages, that in former times the rector of a benefice having cure of souls, sometimes obtained permission from superior authority, to appoint a vicar to officiate under him ; so that by this means two persons were instituted to the same church, and both had cure of souls : the effect of which was, that by custom the rector became at length entirely relieved from residence, and from all other spiritual duties. An incumbent so circumstanced is commonly called a sinecure rector, or rector without cure of souls."

The question I have to decide in the present case is as to the meaning of the expression "rectories with cure of souls" in the Tithe Rentcharge (Rates) Act, 1899. Does the expression include such a rectory as that of Gestingthorpe or not? In solving this question some guidance can be obtained from much earlier legislation.

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The statute 21 Hen. 8, c. 13 ("Spiritual persons abridged from having pluralities of livings") provided by s. 9 that spiritual persons should not hold more than one living with cure of souls; if the holder of a benefice with cure of souls accepted another one with cure of souls, he forfeited the first benefice. And by s. 31 it was provided that "no parsonage that hath a vicar indueed be taken or comprehended under the name of benefice having cure of souls in any article afore specified."

By 13 Eliz. c. 12, s. 3, it is required that a person admitted to a benefice with cure of souls should subscribe and publicly read the Thirty-nine Articles of Religion. It is significant, however, that, as appears from the passage that I have read from Phillimore, a person instituted to a rectory where there is a vicar endowed, that is to say, to such a rectory as that of Gestingthorpe, is not required to subscribe the Thirty-nine Article, a circumstance which entirely accords with the popular view that such a rector has no cure of souls in any real or practical sense, or, as Phillimore puts it, that such a rectory "came to be a sinecure."

The statute of Henry VIII. was ultimately repealed in 1838 by 1 & 2 Vict. c. 106, which in effect re-enacted its provisions against pluralities, and was, like the earlier Act, directed against the holding of more than one benefice with cure of souls. Sect. 124 enacted that a benefice must be taken to mean, for the purpose of that statute, a benefice with cure of souls and no other, unless it should otherwise appear from the context. It is to be observed that the Act of Victoria, passed 309 years after the statute of Henry, does not contain the express provision which was contained in the earlier statute, that a rectory with a vicar endowed was not to be taken as a benefice with cure of souls. But nobody

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doubts that, as is indicated by Phillimore in the passage I have already read, a rectory with a vicarage endowed which was clearly not within the statute of Henry VIII., is likewise not within the Pluralities Act of 1 & 2 Vict. c. 106, the reason obviously being that by the year 1838, and indeed long before, a rectory of this character, commonly known as a sinecure rectory, was regarded by the Legislature as outside the category of benefices with cure of souls. It was pointed out in argument on behalf of the defendants that, if the rectory of Gestingthorpe is to be taken to be a rectory with cure of souls within the meaning of the Tithe Rentscharge (Rates) Act, 1899, it is difficult to hold it to be outside the Pluralities Act, 1 & 2 Vict., with the remarkable consequence that the plaintiff in the present case must have vacated the rectory upon his institution to the vicarage. The solution of this difficulty lies, of course, in holding that the rectory in question is not a rectory with cure of souls.

There are, however, other indications in the statute book which I cannot disregard. Thus, in 1840, 3 & 4 Vict. c. 113, was passed, s. 48 of which provided that certain ecclesiastical rectories without cure of souls, where there was a vicar endowed, should upon the vacancy of the rectory be suppressed. It is to be noticed that there is a sidenote to that section: "Suppression of sinecure rectories." And s. 55, the sidenote to which is "As to certain sinecure rectories," enabled, in certain circumstances, a vicarage dependent on a rectory without cure of souls to be constituted a rectory with cure of souls.

The second report of the Ecclesiastical Commissioners, 1836, which was somewhat earlier than the fourth report, upon which the Act 3 & 4 Vict. c. 113 was based, contains a list of sinecure rectories in the London diocese and includes the rectory of Gestingthorpe as one of them.

It seems to me impossible to escape from the conclusion that the expression "rectory without cure of souls" in the Act 3 & 4 Vict. c. 113 can mean nothing but a sinecure rectory in the popular sense of the term, that is, a rectory with vicarage endowed; otherwise it is difficult to give any meaning to the provisions of the Act.

It was suggested in argument at one time that the Act might be accounted for by the possibility of the existence of a donative rectory, the rector of which, not having had institution at the hands of the bishop, might be said to be a rector without cure of souls; but it seems clear that the Act cannot be explained by the possible existence of such a case; and I understood counsel for the plaintiff to admit that in the Act 3 & 4 Vict. the expression "rectory without cure of souls" must at least include, if it does not refer solely to, a rectory with a vicarage endowed.

In my judgment the true view is that the term rectory with cure of souls in the Tithe Rentcharge (Rates) Act, 1899, cannot but mean a rectory with a real cure of souls; and that, accordingly, those rectories that are commonly known as sinecures are not within that Act. From this it follows that the rectory of Gestingthorpe, being such a rectory as is commonly known as a sinecure rectory, is not a benefice within the meaning of the Tithe Act, 1925.

It was argued, upon the question whether a rectory had acquired the character of a sinecure, that the test must be the residence or non-residence of the rector and the devolution of the spiritual duties upon a vicar; and that, so long as the rector was resident, his rectory was one with cure of souls, with the result that, through the practical union between the vicarage and the rectory brought about by his residence and the exercise of his spiritual duties, the plaintiff's rectory had become in fact a rectory with cure of souls. I am unable to accept that argument as sound. The modern legal characteristics of a rectory with a vicarage endowed must, as it seems to me, be determined by the legal position of the rectory, as it is to be gathered from the law, statutory and otherwise, applicable thereto, and cannot be treated as depending upon the varying facts as to the residence or non-residence of the rector for the time being.

The conclusion of the whole matter is that, in my judgment, the rectory of Gestingthorpe is not a benefice within the

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CLAUSON meaning of the Tithe Act, 1925 ; and, accordingly, the action
J. must be dismissed.

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Solicitors : *Lee, Bolton & Lee ; E. J. Hare, Official Solicitor*
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Dec. 15, 16, 17, *Landlord and Tenant—Lease—Private Residence—Restrictive Covenants—Not to suffer Demised Premises to be used for carrying on any Business—Residential Area—Amenities—Underlease with similar Covenants—Assignment of Lease and Underlease—Breaches of Covenant both by the Assignee of Lease and of the Underlease—Conversion into Flats by Assignee of Underlease—Business—Knowledge of Assignee of Lease—Meaning of Covenant to “do or suffer” in Headlease—Order XXI, r. 21.*

By a lease dated April 11, 1865, the Governors of a College granted to D. the lease of a private dwelling-house on their estate—the amenities of which they were very desirous to safeguard—for a long term of years. There was a covenant in the lease by D. that he would not (*inter alia*) suffer the demised premises to be used for carrying on thereon any trade or business or for any purpose that might be deemed by the Governors or their successors an annoyance or inconvenience to the neighbourhood. There was the usual power of re-entry for breach of any covenant.

In 1894 the lease was assigned to the defendant R., subject however to an underlease to G. This underlease, which contained the same terms as the headlease, was in 1928 assigned to the defendant P. P., the underlessee, having by certain internal structural alterations of the demised premises converted them into three separate flats, proceeded, without the knowledge or consent of the plaintiffs (who were the successors in title to the Governors who had originally granted the lease and also the present reversioners in fee simple expectant on the determination thereof), to let them out to tenants at various rentals. P. also contracted to supply the tenants with certain services, hot water, heat, lighting, etc. It was proved in evidence that R. knew of the acts of P. but took no steps to prevent the letting or stop the acts in any way.

The plaintiffs thereupon sought to recover possession on the ground of alleged breaches of the covenants in the headlease as to user:—

Held, that what P. had done constituted the carrying on of a business, inasmuch as she retained control of an important portion of the demised premises and was under liability to supply certain services, such as

hot water, etc. She had therefore committed a breach of both the covenants as to user contained in the underlease and as to acts deemed by the plaintiffs to cause an annoyance or inconvenience to the neighbourhood.

Held also, that R., by knowingly permitting the letting out of the demised premises in flats and taking no steps to prevent what she had been informed would constitute a breach of the covenants in the headlease, had committed a breach of the covenant "not to suffer the same to be used for the carrying on of any . . . business or for any purpose that might be deemed by the Governors or their successors to be an annoyance or inconvenience to the neighbourhood."

The plaintiffs were therefore entitled to an order for possession of the demised premises.

Atkin v. Rose [1923] 1 Ch. 522 followed.

Possible distinction between "permit" and "suffer" in restrictive covenants considered.

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ACTION.

In this action the plaintiffs, who were the Estates Governors of Alleyn's College of God's Gift at Dulwich in the county of Surrey, sought to recover possession of a certain messuage and premises known as 37 Alleyn Park in the parish of St. Giles, Camberwell, which had been granted for a term of years by a lease in 1865, and to which they were entitled as the reversioners in fee simple expectant upon the determination thereof. Possession was claimed on the ground of certain alleged breaches of covenant as to user.

By the lease in question, which was dated April 11, 1865, and made between the then Governors of the said college (thereinafter called "the lessors") of the one part, and one Frederick Doulton of the other part, for the consideration therein mentioned, the messuage, land and premises (the subject-matter of the action)—now known as 37 Alleyn Park, Dulwich—were demised by the lessors to the said Frederick Doulton, his executors, administrators and assigns for the term of eighty-four years from March 25, 1859, at the clear yearly rent therein mentioned and under the description following—namely, "All that plot of ground situate and being on the west side of a certain road at Dulwich aforesaid called or intended to be called Palace Road (now known as Alleyn Park) And also all that messuage or tenement now erecting and building thereon situate in Dulwich

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The lease contained the usual covenants by the lessee for himself, his heirs, executors, administrators and assigns with the lessors, their successors, heirs and assigns to pay the yearly rent and complete the said messuage then in course of erection on the terms therein mentioned, and also that the lessee would not permit or suffer any gravel, etc., to be removed. There was a further covenant by the lessee, his executors, administrators or assigns, not to erect or suffer to be erected upon the demised premises any other messuage, dwelling-house or building whatsoever without the licence of the said Governors in writing first being obtained. Then followed a covenant in the following terms: “And also that he the said Frederick Doulton his executors administrators or assigns shall not convert the said messuage when so completed or any buildings to be erected on the said premises into or suffer the same to be used as an inn public house tavern or place of public entertainment or for the carrying on thereon any trade business or manufactory or for a school or chapel or place of public worship or for the reception of lunatics or insane persons or parish poor or in any way or manner or for any purpose that shall or may be deemed by the said Governors or their successors or assigns to be an annoyance or inconvenience to the public or neighbourhood or to any contiguous tenants of the said Governors.”

The lease also contained a proviso for re-entry as follows: “Provided always and these presents are upon this express condition that if . . . the said Frederick Doulton his executors administrators or assigns shall not in all things . . . observe perform . . . all and every the covenants and agreements hereinbefore contained . . . then . . . in any of the said cases it shall be lawful for the said Governors and their successors . . . into . . . the said premises or any part thereof in the name of the whole . . . to re-enter and the same to . . . repossess . . . and the said Frederick Doulton his executors administrators and assigns and all persons whomsoever thereout and from thence utterly to expel . . . and remove . . .”

On or about January 29, 1894, the lease was assigned to LUXMOORE and became vested in the first defendant, Miss Mabel M. L. M. Reed, and she remained ever since the assignee of the term granted by the lease, subject however to an underlease thereof dated December 23, 1865. She was not in occupation of the premises.

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By the underlease in question, which was made between the above mentioned Frederick Doulton of the one part and one Samuel Gibbins of the other part, the above mentioned premises were demised to the said Samuel Gibbins for the term of seventy-nine years less ten days from March 25, 1864, at the yearly rent therein mentioned. This underlease contained covenants which were substantially in the same form as the covenants in the headlease of April 11, 1865, the covenant as to conversion and user being in the following form: "The lessee his executors administrators or assigns shall not convert the said messuage or any buildings to be erected on the said premises into or suffer the same to be used as an inn public house tavern or place of public entertainment or for the carrying on thereon any trade business or manufactory or for a school or chapel or place of public worship or for the reception of lunatics or insane persons or parish poor or in any way or manner or for any purpose that shall or may be deemed by the superior lessors of the premises an annoyance or inconvenience to the public or neighbourhood or to any contiguous tenants of the superior lessors." The underlease also contained a power for re-entry similar to that in the headlease on breach of the underlessee's covenants. This underlease was assigned to the second defendant, Mrs. Agnes V. Porter, on or about March 24, 1928, and was at the date of the issue of the writ still vested in her. Her interest, however, was subject to a charge in favour of the defendant, the Hon. Edward Duke.

The house, No. 37 Alleyn Park, was built as a single dwelling-house, and had a large garden attached. For a considerable distance all round the land belonged to the plaintiffs, and formed part of a large area which had been developed as a high class residential estate.

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By their statement of claim the plaintiffs alleged that the second defendant Mrs. Porter (the assignee of the underlease), shortly after it was assigned to her, wrongfully and without the knowledge or consent of the plaintiffs as the Estates Governors of the College, converted the premises, which consisted of three floors and was hitherto used as a single dwelling-house, into three separate tenements or flats by causing to be made therein certain structural alterations. Having therefore, as they alleged, made these alterations, the defendant Mrs. Porter in 1929 and 1930 sub-let the three floors as separate flats to three separate sub-tenants on short tenancies and at various rentals. The alterations carried out and the sub-tenancies made by the defendant Mrs. Porter are more fully referred to in the judgment of the learned judge. Between the various sub-lettings, Mrs. Porter occupied different floors herself, but on October 9, 1930, five days before the issue of the writ, she went out of possession.

The matter having been brought to the notice of the plaintiffs, they pointed out that in their opinion a breach of the lessee's covenants in the headlease dated April 11, 1865, had been committed. They maintained that the single messuage demised by the headlease had been by these alterations converted into a place for the carrying on thereon a business—namely, that of sub-letting the house as residential flats—and was being used for that purpose; and, further, was being used in a way and for a purpose which in their opinion was an annoyance or inconvenience to them as owners (being the Estates Governors) of other houses and premises in the neighbourhood and to the contiguous tenants of the demised premises.

On June 17, 1930, the plaintiffs served on the first defendant Miss Reed, the assignee of the headlease, a notice in writing specifying the breaches of covenant complained of and requiring her to remedy the same and make compensation in money therefor. The circumstances leading up to the serving of this notice are also more fully referred to in the judgment of the learned judge.

Ultimately the writ in the action was issued on October 14, 1930, by which the plaintiffs claimed as above stated to recover possession of the demised premises by reason of the alleged breaches of covenants as to user.

The original defences of the lessee and underlessee were simply that they were in possession by themselves or their tenants (Ord. XXI., r. 21). At the first hearing, however, on October 27, the plaintiffs, after giving notice that the point would be raised, stated that they would claim—after proof of the lease, the assignment thereof to the first defendant, Miss Reed, and the devolution of the reversion to themselves—possession on the ground of the forfeiture due to the first defendant pleading a denial that she had ever held under the lease. Seeing however that this was the first time this plea had been raised against them, the plaintiffs offered to waive the forfeiture (if any) on the terms that these two defendants put in proper defences, and the payment of a portion of the costs of the hearing on the day. This offer was accepted and terms were agreed on. (1) The matter thereupon stood over until December 15 following for these two defendants—the plaintiffs having waived their right to forfeiture—to put in proper defences.

Gavin T. Simonds K.C. and *F. E. Farrer* for the plaintiffs. It is submitted that there has been a clear breach of the covenants in the headlease. If the second defendant, Mrs. Porter had been the assignee of the headlease, a breach of the covenants as to carrying on a business would have been committed. What she has done is undoubtedly a breach of the covenants in the underlease. By letting the house in separate flats, by residing in that part of the premises which was for the time being unlet, and supplying to her tenants some service—for instance, hot water and fuel for heating, etc.—the underlessee was carrying on a business, to wit that of letting in residential flats: *Rogers v. Hosegood* (2) ;

(1) [The point which it thus became needless for the Court to consider is discussed in an article in 76 Sol. Journal 73.—A. R. T.]

(2) [1900] 2 Ch. 388, 394.

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With regard to the lessee, Miss Reed, it is submitted that she was liable on the covenant. First, the covenant amounts to an absolute covenant not to convert or use. "Suffer" primarily means "to undergo," secondarily only "to permit, not to prevent." In this lease both words "permit" and "suffer" were used in one of the preceding covenants; on every principle then "suffer" means here more than "permit." Where a man covenants that he will not "wilfully do or suffer," as in *Bryant v. Hancock & Co.* (2); *Hobson v. Middleton* (3), of course he is not liable for a thing which he cannot prevent. So, if a statute constitutes "suffering" a thing to be a crime or penalty, the mens rea is involved and the statute must be strictly construed. In *Berton v. Alliance Economic Investment Co.* (4) the main covenant sued on used the word "permit." The fact that in that case counsel drew no distinction between "permit" and "suffer" does not matter. In future cases involving the use of these words in covenants the distinction is open to argument, and on this special point argument here is reserved. Secondly, it is submitted that the evidence clearly shows that the first defendant, the lessee, knew of the complaints made by the plaintiffs to Mrs. Porter that she was sub-letting the house in flats, and also the lessee had been informed by the plaintiffs and asked if she knew of the underlessee's acts. A great deal of correspondence on the subject had passed between her, her solicitors and the plaintiffs. She could have stopped the underlessee's acts by injunction or otherwise. It is submitted she is therefore liable: *Berton v. Alliance Economic Investment Co.* (4); *Atkin v. Rose.* (5)

E. W. Lavington for the first defendant, Miss Reed. No breach of covenant has been committed: *Barton v. Keeble.* (6) This defendant has not converted the house into flats, nor has she herself carried on a business on the premises.

(1) (1884) 27 Ch. D. 71, 88.

(2) [1899] A. C. 442, 445.

(3) (1827) 6 B. & C. 295, 303.

(4) [1922] 1 K. B. 742, 761.

(5) [1923] 1 Ch. 522.

(6) [1928] Ch. 517, 523.

G. D. Nokes for the second defendant, Mrs. Porter. It cannot be said that this defendant ever carried on a business on the premises. But if she was at one time so doing, she quitted the premises in October, 1930, before the issue of the writ, and thereupon ceased to carry on business on the premises. Any agreements she may have entered into as to letting part of the premises were negotiated elsewhere: *Fordree v. Barrell* (1), where Scrutton L.J. in his judgment refers to the carrying on the business of letting furnished lodgings. Compare *Ebner v. Lascelles* (2), a case under the Increase of Rent, etc. (Restrictions) Act, 1920.

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Further, it is submitted that the plaintiffs have not produced any evidence that what was done was deemed by them to be an annoyance. The Governors can only act in a judicial capacity at a properly constituted meeting with a proper quorum present; they should not act arbitrarily.

F. Soskice for the defendant, the Hon. E. Duke.

Gavin T. Simonds K.C. in reply. The evidence as to the breaches of the covenant is clear. It also shows that a proper quorum was present at the meetings of the Governors and that these meetings were properly constituted. It has been definitely shown that the Governors deemed an annoyance or inconvenience was being caused by the acts of the second defendant within the meaning of the covenant. When the underlessee ceased personal residence a short time before the issue of the writ, she did not in fact cease to carry on thereat the business. But even if she had done so, that would be immaterial. The restoration of the status quo ante before the reversioner entered on account of a forfeiture did not at law purge the forfeiture. Sect. 146 of the Law of Property Act, 1925, on this point does not assist the defendants. Neither had remedied the breach, nor made any compensation or paid the costs of the lessors.

LUXMOORE J. The plaintiffs are the Estates Governors of Alleyn's College of God's Gift at Dulwich, and they are seeking to recover possession of a messuage and premises

(1) [1931] 2 K. B. 257, 262, 263. (2) [1928] 2 K. B. 486, 501.

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situate on and forming part of the estate belonging to the Governors in the parish of St. Giles, Camberwell, in the county of Surrey. The messuage and premises are known as 37 Alleyn Park (formerly Palace Road), and the ground on which possession is claimed is that the Governors as the reversioners expectant on the determination of a term of years granted in the year 1865 in respect of the premises are entitled to re-enter under the proviso for re-entry in that lease by reason of certain alleged breaches of covenant as to user. These breaches consist in their opinion by the conversion of the premises into three separate tenements by making certain internal structural alterations on each of the floors constituting the house.

The College estate in Camberwell embraces a large area containing about 1478 acres. This area has been developed and now contains some 3290 houses. Over 400 acres are devoted to open spaces, including Dulwich Park, which was some years ago given to the London County Council as a public park. Part of the estate is known as Alleyn Park, and at the time at which the lease, to which I shall presently refer, was granted, this part of the estate was being developed for residential purposes in plots, each plot having a single dwelling-house erected on it. I believe there are eighty-six such dwelling-houses on this part at the present time. Recently applications have been made to the Governors to allow the conversion of some of these houses into a number of separate tenements or flats, and in some very few instances permission has been granted for this purpose; but speaking generally, the Governors have, except in these very special cases, refused to consent to any conversion, and have resisted applications under the Housing Act, 1925, s. 102, to vary the covenants of particular leases and to allow any conversion to take place.

The lease in question is dated April 11, 1865. [His Lordship stated the facts as substantially set out above.] The house now consists on the top floor of three rooms, a living room, two bedrooms, a small room used as a kitchen, and bathroom and other offices. This top floor is separated from the rest of

the house by a door shutting off the staircase at the point where it leads up to this floor. On the first floor there are two sitting-rooms and three bedrooms, a separate kitchen, bathroom and a dressing-room, which is used for some other purpose. On the ground floor there are two reception rooms, two bedrooms, a kitchen, and again a separate bathroom and other offices. There is no evidence as to when or by whom these structural alterations were made. Neither the defendant Miss Reed, nor the other defendant Mrs. Porter, nor any person on her behalf has given evidence, nor was she interrogated with regard to the matter. It is however admitted that she has sub-let the three floors on various occasions. On February 27, 1929, Mrs. Porter entered into an agreement with one Harold Cunningham whereby he agreed to occupy for dwelling purposes only the top floor suite of rooms with private stair for a period of five years from March 25, 1929, to March 25, 1934, with the option of a break at the end of three years. The agreement says: "For the use of these rooms partly furnished I agree to pay the sum of 104*l.* per annum payable quarterly in advance, inclusive of all rates and taxes. I also agree to abide by the rules of the Dulwich College with you." Then there was a note which said that "partly furnished" meant "the linoleum on the floor of the hall and bathroom which was laid when I entered on possession of the premises." Mr. Cunningham has given evidence, and he stated that at the same time as he entered into that agreement verbal arrangements were made under which he was to have a supply of hot water provided for him by Mrs. Porter and that certain services should be rendered with regard to the hall and staircase and the cleaning of those parts of the building. At about the same time an agreement was entered into letting the ground floor to a Mr. J. H. Taylor. I have not seen the agreement between Mrs. Porter and Mr. Taylor. At this time Mrs. Porter was herself in occupation of the first floor and she remained in occupation of that floor until about the time when she agreed to let it to a Mr. S. P. Pamment. His agreement is dated December 30, 1929: "I Sidney P. Pamment agree to rent from you the first floor suite of

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LUXMOORE rooms at the above address for a period of five years (5 years) or with the option of breaking after three years commencing December 9, 1929, to December 8, 1934.”—I think the words “with the option of breaking after three years” should come in after “commencing December 9, 1929, to December 8, 1934,”—“for the sum of 130*l.* (one hundred and thirty pounds) per annum payable quarterly in advance. The rent to include all rates and taxes and a supply of hot water”; and again there is the provision: “I agree with you to abide by the rules of the Dulwich College.” Mr. Taylor terminated his agreement in May, 1930, and after he had left, Mrs. Porter occupied the ground floor of the premises until October 9, 1930, when she gave possession to a Mr. E. J. Baldwin, with whom she had entered into an agreement on September 29 of that year. The agreement is a more formal one than the others. It provides for the letting of the ground floor “including the back garage and portion of the garden of the premises known as 37 Alleyn Park, West Dulwich,” with the right of user of the entrance hall in common with the other tenants for the term of one year from October 9, 1930, at a yearly rent of 120*l.* payable quarterly in advance. The tenant agrees to pay the rent to the landlord without any deduction, also to pay for gas and electric light and—this is important—“the tenant likewise agrees to pay his proportion of the cost of fuel for the domestic hot water supply to the said flat and also for the central heating at the rate of not exceeding 5*l.* (five pounds) per annum to be paid quarterly on demand by way of additional rent.” I do not think I need refer to any of the other provisions in that agreement.

It is alleged that what Mrs. Porter has done would constitute a breach of the covenants contained in the head-lease if she had in fact been an assignee of that lease, and that such acts constitute breaches of covenants in the underlease. So far as Mrs. Porter is concerned I am satisfied that what she has done constitutes the carrying on of a business. She has let suites of rooms. She has agreed to provide, and is bound to provide certain services, for instance the provision of hot water. She has agreed to provide for the cleaning

of the hall and staircase and matters of that kind, and she retains control at any rate of parts of the house such as the hall, staircase and garden which are not included in the respective tenancies. I think this is none the less a business although it has no specific description. "Business," of course, is a wide and flexible word, but that the sub-letting of premises in suites of apartments with or without the provision of any other service is a business, I think can be open to little doubt. In the Landlord and Tenant Act, 1927, which is "An Act to provide for the payment of compensation for improvements and goodwill to tenants of premises used for business purposes, or the grant of a new lease in lieu thereof; and to amend the law of landlord and tenant"; it is provided by s. 17, sub-s. 3, as follows: "For the purposes of this section, premises shall not be deemed to be premises used for carrying on thereat a trade or business—(a) by reason of their being used for the purpose of carrying on thereat any profession," and "(b)"—and this is the material part—"by reason that the tenant thereof carries on the business of subletting the premises as residential flats, whether or not the provision of meals or any other service for the occupants of the flats is undertaken by the tenant." This suggests that unless the provision had been put in there could be no question but that the sub-letting of premises in the particular way referred to would be considered or might be considered the carrying on of a business.

It is said by Mr. Nokes, to whom I am indebted for an able argument, that no business has been carried on at any rate since October 9, 1930, because on that date Mrs. Porter left the house and no longer resided there; that the business, if it be one, consists in the negotiation of and entering into agreements for letting, and that those negotiations and agreements must be taken to have been effected elsewhere, because Mrs. Porter was no longer resident in any part of No. 37. I do not think this follows, and I have no evidence that Mrs. Porter negotiates or enters into agreements relating to these premises somewhere else. She has not been called and I see no reason why I should make any

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LUXMOORE inference in her favour to this effect. In my judgment the fact that she retains control of an important portion of the premises and is under liability to supply certain services, like the provision of hot water and so on, constitutes the carrying on of a business. Mr. Nokes asked me to infer that she no longer supplied the hot water service and the other services because the ground floor flat was let to Mr. Baldwin. I can see no reason to make any such inference, more especially as Mr. Baldwin's agreement provides that he will pay his proportion of the cost of the fuel for the domestic hot water service supply to the flat—I suppose on the ground that Mrs. Porter herself is to provide that service. I have no doubt whatever that Mrs. Porter is in fact carrying on a business at No. 37 which would constitute a breach by her of the covenants of the headlease if she were the assignee, and which in fact constitutes a breach by her of the covenants of her underlease. Further I am satisfied that what she is doing would also be a breach of the second part of the covenant in the headlease, not to suffer the premises to be used “in any way or manner or for any purpose that shall or may be deemed by the Governors or their successors or assigns to be an annoyance or inconvenience to the public or neighbourhood or to any contiguous tenants of the said Governors.”

It has been argued that there is no evidence that the Governors have in fact considered that what is being done is in fact an annoyance or inconvenience within the words of the covenant. The evidence of the chairman of the Governors has satisfied me that the whole matter was considered at a properly constituted meeting of the Governors, and that the members present were unanimous on the point before instructing the solicitors to take steps to enforce the observance of the covenant. Further I am satisfied by the evidence that the Governors have, except in special cases, always resisted any attempt to vary the covenants so as to enable houses in particular parts of the estate to be let out in separate suites or flats, and that this resistance has been on the ground that they deem this kind of proceeding detrimental to the estate, to their tenants and those interested in it.

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Of course, the matter does not end here, for though Mrs. Porter may, in doing what she has done, be effecting what would be breaches of covenant if she were an assignee of the headlease, still there is no contractual relationship between Mrs. Porter and the Governors. The Governors can re-enter only if their lessee, Miss Reed, has committed a breach of covenant. Admittedly Miss Reed has not converted the house into a place of business and is not herself carrying on any business in it, but the covenant binding on her is that she will not "suffer" the premises to be used for the carrying on thereon of any business or in any way or manner or for any purpose that shall be deemed by the Governors to be an annoyance or inconvenience to the public or the neighbourhood or any contiguous tenants. At any rate, the covenant is one which imposes some liability on the lessee. Mr. Gavin Simonds was prepared to argue that this was in fact an absolute covenant against user of the premises for the purpose of a business, and he reserved this point in the event of the case going elsewhere. However, the point has not been argued before me and I say nothing more about it.

The word "suffer" is a wide term. It seems to me to be wider than the word "permit." Obviously had Miss Reed given permission for the business to be carried on she would have committed a breach. The words "permit" and "suffer" have been the subject of judicial decision, and in one case I think it was said they were synonymous; but whether this is in accordance with other decisions is not material to this case. Speaking for myself, with all possible respect to the learned judge who said so, I think there may well be as a matter of construction a substantial difference between the word "permit" and the word "suffer," but, as I say, it is not material to consider it here. The word in the case before me is "suffer," and at any rate that must cover allowing something to be done which the covenantor has the complete power to prevent. It is said that a covenant not to suffer a thing to be done imposes no liability on the covenantee to take legal proceedings to prevent the thing being

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LUXMOORE J. done. I think that is putting the case too high. In the case of *Berton v. Alliance Economic Investment Co.* (1) Atkin L.J. said this: "The alleged breaches of the covenants in the lease of March 25, 1907, consisted in permitting parts of the premises to be occupied as separate tenements by several tenants," and he referred to the case of *Berton v. London and Counties House Property Co.* (2), and continued: "But the question is whether the appellants have, to put it shortly, used the premises or permitted them to be used in breach of the first covenant, or suffered them to be used in breach of the second." The first covenant was that "the lessee will not without the lessor's previous licence in writing use the premises or any part thereof or permit the same to be used for any purpose whatsoever other than for the purpose of a private dwelling house wherein no business of any kind is carried on." The second material covenant was: "That the lessee will not without the lessors' previous licence in writing . . . do or suffer to be done in or on the demised premises anything which may in the judgment of the lessors be or grow to the injury or annoyance of the lessors or any of their tenants or of any of the occupiers of any contiguous or adjoining premises or of the public or neighbourhood." The learned Lord Justice continued: "It is not suggested that there is any difference between the words 'permit' and 'suffer' in this context, and I treat them as having the same meaning. It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit. The user in one case and the permission in the other must be something which can be predicated of the defendant or the defendant's agent. It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent. It is not suggested that the appellants themselves

(1) [1922] 1 K. B. 742, 758, 759,
760, 761.

(2) November 17, 1920. Un-
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used the premises wrongly; the facts are that they let them to MacIntosh and MacIntosh let them in separate tenements to the several undertenants. What is said is that the appellants permitted the premises to be used contrary to the terms of the covenant. To my mind the word 'permit' means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it. Acts which fall short of that, though they be acts of sympathy or assistance, do not amount to permission at any rate in the covenants with which we are dealing." And later on he says: "The gravamen of the charge against the appellants is that they took no proceedings to obtain possession against the undertenants. The appellants answer that there is authority for holding that under the Rent Restrictions Act, 1915, these undertenants would have been entitled to remain in possession and that under the Act of 1920 it is extremely doubtful whether possession could be recovered against them; that in any case the Court would have a discretion to stay or adjourn the proceedings and that the appellants have power to apply under s. 27 of the Housing and Town Planning Act, 1919, to the county court for permission to convert these premises into and let them as separate tenements. For my part I am inclined to think that in certain circumstances a man may permit the continuance of an act if he can prevent it by taking legal proceedings and refrains from doing so. I can imagine a simple case, where a bailee, having agreed with the owner of a chattel not to permit any third person to have possession of it, is deprived of it by a third person; where he knows the third person is in possession of the chattel, and that a writ claiming a specific return of it could have but one result; if he refrained from taking proceedings I suggest that he might be held to have permitted the third person to have possession. But all the circumstances must be taken into account, and where there is a reasonable doubt whether legal proceedings to stop an act would be successful; where, for example, a person takes legal advice and comes

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LUXMOORE J. to the conclusion that he could not reasonably expect legal action to be successful, there he does not permit the act by abstaining from legal proceedings.”

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That statement by Atkin L.J. was approved and followed and applied by Lawrence J. in *Atkin v. Rose* (1), where he said this: “In these circumstances the first question which falls to be determined by the Court is whether the defendant Rose has ‘permitted or suffered’ Goodman to use or exercise in or upon some part of the demised premises the trade or business of a hairdresser, within the meaning of the covenant contained in the lease of March 24, 1919, and has consequently committed a breach of that covenant. In my judgment the defendant Rose has permitted or suffered and is still permitting and suffering the carrying on of the hairdressing business and, therefore, has committed and is still committing a breach of his covenant. In my opinion, it is plainly within the power of the defendant Rose to stop the business which Goodman is carrying on. It is true that, in order to do so, he may have to commence and prosecute the appropriate legal proceedings. It is also true that it cannot be affirmed, as a general proposition, that a covenantor under such a covenant is committing a breach of the covenant, whatever the facts may be, unless he takes legal proceedings to prevent or stop the continuance of the prohibited business. Every case must depend upon its own circumstances. In the present case, however, it is proved that the defendant Cohen could have no defence to an action brought by the defendant Rose, and that there are no facts which would render it unreasonable for the defendant Rose to bring an action against the defendant Cohen which could have but one result. In these circumstances, I am of opinion that, so long as the defendant Rose abstains from taking the proper steps for preventing the business from being carried on, he is permitting or suffering the business to be carried on.” I do not think I need read any other part of the judgment.

With those cases in mind, what are the special circumstances in this case? I have already held that Mrs. Porter

(1) [1923] 1 Ch. 522, 532, 533.

would have committed a clear breach of the covenants in the lease if she had been an assignee. She has committed a clear breach of the covenants contained in her underlease. The matter was, however, brought to the defendant Miss Reed's attention from time to time. As early as April 5, 1928, her attention was called to the question of 37 Alleyn Park by the secretary and general manager of the Governors. On April 4, 1929, the solicitors to the Governors wrote to her and asked her to inform them whether the house was occupied by more than one tenant, "as any such subdivision of the premises into tenements would be considered a breach of covenant." That was answered by her solicitors, who apparently had made an inquiry of the lessee and had been told that they were occupied by one tenant only. Further correspondence ensued and the matter proceeded. In April, 1930, the general manager wrote to the defendant Miss Reed giving formal notice that they required to enter upon the premises and asking for a day to be fixed, and an inspection was ultimately held in May, 1930. As a result the solicitors for the Governors wrote to Miss Reed's solicitors and told them that: "Upon inspection of the premises it was found that a breach of covenant was being committed by letting the house in floors as furnished suites, and we have been instructed to serve a notice of breach of covenant. The notice has been sent to the estates secretary and general manager for service by delivery on the premises. . . ."

No step was taken, however, by Miss Reed, I think, even to inspect the premises or to have them inspected on her behalf to see what was being done, and in those circumstances this action was instituted.

In the circumstances I am of opinion that this case is covered by the decision of Lawrence J. in *Atkin v. Rose*. (1) I am satisfied that there was a clear breach by Mrs. Porter of both the covenants in the underlease, and that Miss Reed had no difficulty whatever in seeing that that breach did not continue. It was her duty under the covenant if necessary to take the necessary legal proceedings to stop what

(1) [1923] 1 Ch. 522.

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LUXMOORE J. Mrs. Porter was doing, and if she had taken those proceedings there would have been no doubt whatever as to their result. The proper notice for forfeiture has been given and it has not been complied with. There is, as I have said, a breach by the defendant Miss Reed of the covenants in the head-lease which has made the right to re-enter by the Governors effective, and in those circumstances the plaintiffs are entitled to an order for possession of the premises and for mesne profits as from October 15, 1930. They are also entitled to an order for the sum which is due in respect of the arrears of rent down to October 14, 1930, when the writ was issued.

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Solicitors: *Druces & Attlee; Reed & Reed; Herbert A. Phillips; Edward Mackie & Co.*

A. R. T.

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[1931. W. 43.]

Crown—Bona Vacantia—Mortgage by a Company of Leaseholds by Assignment—Dissolution of Company before 1929—Claim of Crown to the equity of redemption not allowed—Mortgaged Property vested absolutely in Mortgagees—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 296.

A company in 1899 mortgaged certain leasehold properties by assignment of the residue of the terms to the mortgagees, subject to a proviso for redemption. In 1910 the company was wound up voluntarily and a liquidator was appointed. In 1916 the company was dissolved. The mortgagees had in 1913 appointed a receiver of the rents, but at that time the net rents were insufficient to pay the full interest on the mortgage. The liquidator considered that the equity of redemption was of no value and did not either surrender it to the mortgagees nor part with it to any person. The rents had now largely increased in value and the arrears of interest had been paid off, and the equity of redemption had become of value. The Crown claimed the equity of redemption as bona vacantia, and the mortgagees claimed that they were entitled to the property free from any right to redeem:—

Held, on the authorities, that the Crown can claim as bona vacantia property in the hands of another person only if that person holds it under

some trust for a legal entity ; that a mortgagee is not a trustee of the equity of redemption for the mortgagor ; that the Crown's claim failed, and that the mortgagees were owners of the term without any right in any person to redeem.

The judgment of Wright J. in *In re Higginson & Dean. Ex parte Attorney-General* [1899] 1 Q. B. 325 applied.

Held also, that s. 296 of the Companies Act, 1929, was not retrospective, and did not affect the right of the Crown to any property which had not accrued before the passing of the Act.

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ADJOURNED SUMMONS.

This summons was issued to determine the question whether or not the Crown can claim as *bona vacantia* the equity of redemption in property mortgaged by assignment by a company which was dissolved prior to 1929.

Sir Thomas Spencer Wells, by his will dated November 19, 1896, after making various bequests, devised and bequeathed to his executors and trustees the residue of his real and personal estate upon trust to invest certain shares thereof upon the securities therein mentioned, including freehold, copyhold, leasehold and chattel real securities in Great Britain, but not in Ireland, and to hold such investments upon the trusts therein declared which were still subsisting.

The testator died on January 31, 1897, and the will was duly proved in the Principal Probate Registry on March 30, 1897.

The trustees of the will invested the sum of 4325*l.*, being part of the said trust shares, upon a mortgage of three leasehold properties, known as 3, 4 and 5 St. Johns Park Mansions, Pemberton Gardens, in the county of London, which were then vested in the Tufnell and Caledonian Parks Syndicate, Ltd. (hereinafter called "the company"), for the respective terms of ninety-nine years from June 24, 1868 (less the last three days thereof), by three underleases, one dated April 25, 1899, and the others dated July 3, 1899, at the yearly rent for each property of 80*l.* By the mortgage dated October 31, 1899, the company covenanted with the trustees to repay the said sum of 4325*l.* with interest thereon at the rate of 4*l.* per cent. per annum, and assigned to the trustees the said three properties for the whole of the unexpired

FARWELL residue of the terms for which the same were respectively held, subject to the usual proviso for redemption.

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On March 23, 1910, the company passed an extraordinary resolution that the company should be reconstructed by a sale and transfer of its property, assets and liabilities to a new company, and that the company should be wound up voluntarily, and that Llewellyn Howard Wilkins should be appointed liquidator. The extraordinary resolution was duly confirmed by resolution on April 7, 1910.

In July, 1913, the trustees gave notice to the liquidator to pay off the mortgage money, but default was made in payment. In December, 1913, the trustees appointed Claude Lound receiver of the income of the mortgaged property, and he entered into possession of the rents and profits. From the accounts rendered by the receiver it appeared that after payment of the ground rents and other outgoings a very small balance of the rents came to the hands of the trustees which was not sufficient to satisfy the interest.

The company was never reconstructed, nor was any sale or transfer made to any new company, and on May 24, 1916, the company was dissolved. At the time of the dissolution the liquidator was of opinion that in the circumstances the equity of redemption of the mortgaged premises was of no value, and he took no steps either to surrender the equity of redemption to the mortgagees or to sell or dispose of it to any other person. The said Claude Lound continued to act as receiver of the income of the mortgaged property until 1921, when the mortgagees appointed Percy Lawrence to act as receiver in his place. At the time of the dissolution of the company there was a substantial sum due to the mortgagees in respect of interest, which the net rents had been insufficient to meet. Since the dissolution the rents of the mortgaged premises had largely increased, with the result that the net rents received had been sufficient to pay the current interest and all arrears of interest, and to leave a balance in the hands of the receiver. The equity of redemption in the mortgaged premises had therefore become of value. Questions then arose as to the persons entitled to the equity of

redemption, and the Crown claimed to be entitled to it as bona vacantia, while the surviving trustee claimed that in the circumstances no one was entitled to redeem the property, and that he as survivor of the mortgagees, to whom the property had been assigned, was entitled to it free from any equity of redemption.

The surviving trustee, therefore, issued this summons to which one of the beneficiaries and the Attorney-General, representing the Crown, were parties. The summons came before Eve J. on April 17, 1931, and, as at that time no definite information had been obtained as to the circumstances of the dissolution of the company, his Lordship directed an inquiry in the following terms: "Whether the company was reconstructed under s. 192 of the Companies (Consolidation) Act, 1908, or otherwise, and whether any and what property of the company was sold or transferred to any other company or person on the terms of the scheme of reconstruction mentioned in the extraordinary resolution of the company or on any other and what terms." The summons then stood over. The former liquidator of the company was afterwards found, and made an affidavit giving the facts of the dissolution as before mentioned, and the Master made his certificate accordingly.

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The summons was then restored for hearing.

R. G. Nicholson Combe for the plaintiff.

R. H. Hodge for the beneficiaries under the will. I submit that the equity of redemption has now disappeared and is not vested in the Crown. If the case was controlled by s. 296 of the Companies Act, 1929 (1), I think I should have nothing to say. But it is the ordinary rule of construction that an

(1) Companies Act, 1929, s. 296: "Where a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property but not including property held by the company on trust for any

other person) shall, subject and without prejudice to any order which may at any time be made by the court under the two last foregoing sections of this Act, be deemed to be bona vacantia and shall accordingly belong to the Crown."

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Act of Parliament is not construed retrospectively unless it is clearly so expressed. Here there is nothing to suggest that the section is retrospective. The law before 1929 was considered in *In re Higginson & Dean. Ex parte Attorney-General* (1) in an elaborate judgment of Wright J., concurred in by Darling J. In that case money in the hands of a trustee in bankruptcy was held to be bona vacantia and pass to the Crown, but the decision was based on the fact that the money was in the hands of the trustee in bankruptcy as trustee for the other creditors, and as the company which had been dissolved would if in existence have been a creditor, the money was held in trust for the Crown as bona vacantia. But here the mortgagees were not trustees of the equity of redemption for any one. If they had sold any part of the property they would have been trustees for the mortgagor of the surplus after satisfying their debt, but while the mortgage is on foot the mortgagee is in no way a trustee for the mortgagor. The decision in *In re Higginson & Dean* (1) was based on the principle that the Crown can only claim where it can allege a trust as it could in that case, and it was held that the Crown took the place of the extinct cestui que trust. The mortgage here was in form an absolute assignment to the mortgagees of the whole terms which were vested in the company, subject to an equity of redemption in the company to redeem on payment of the debt, interest and costs.

[FARWELL J. There are, I think, two matters which will assist in considering the case. The first is that I do not see that the fact that the mortgagees were trustees of the money advanced affects the question one iota. The second is: Were the mortgagees at any material time trustees of anything for an entity which has now disappeared? Subject to what Mr. Stafford Crossman may say, I cannot at present see how a mortgagee can be said to be a trustee of the equity of redemption, and even if so, when there ceased to be any person entitled to redeem the mortgagees' estate became an absolute estate.]

(1) [1899] 1 Q. B. 325.

That was the way I was hoping to present the case to your Lordship. I have looked through all the cases cited by Wright J., and they bear out his proposition about the property being held in trust when the Crown claimed it as *bona vacantia*. The Crown must establish that the property claimed is in the hands of some one who is a trustee for some person or entity that has ceased to exist.

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[FARWELL J. I will hear Mr. Stafford Crossman.]

Stafford Crossman. I think I ought to begin by suggesting what *bona vacantia* really are. The best authority as to this is to be found in Blackstone (1), where *bona vacantia* are defined as “goods in which no one else” than the Crown “can claim a property.” If the word “goods” is to be construed strictly, the Crown’s case would fall to the ground, as it would be limited to chattels, but I submit that the word is used in the wider sense of personal property or personal rights. I am going to submit that an equity of redemption is an equitable interest, and that every equitable interest is a subject of *bona vacantia*. When Wright J. spoke of property held by trustees he did not mean trustees who had duties to perform, but property taken under what was in the old days called a trust, that is, an equity. The equity of redemption is, I submit, an equitable interest which devolves as *bona vacantia*. It is the right in equity to compel the mortgagee to reconvey the property to you, although it has become his absolute property. That, I submit, is an equitable interest which devolves upon the Crown as *bona vacantia*. Sometimes in the old cases it is described as an estate, and in *Pawlett v. Attorney-General* (2) it is described by Hale C.B. as a trust, or more than a trust, an equitable interest, and he treated the mortgagee as being in a sense a trustee for the mortgagor. The authorities go to show that a mortgagor has an interest in the land, and in the early cases he is treated as the owner, subject to a charge or mortgage, as he now is under the recent legislation.

(1) Blackstone’s Commentaries (Kerr), 8th ed., vol. i., p. 298.

(2) (1657) Hardres, 465.

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In *Hastings Corporation v. Letton* (1) it was held that in such a case a lessor became entitled to the property demised free from the lease, but that was the case of a legal interest, and it has never been suggested that the same reasoning applied to an equitable interest. I submit that in this case the debt of the company under the mortgage did not cease on the dissolution, and the equitable right to redeem remained. The result of the judgment of Hale C.B. in *Pawlett v. Attorney-General* (2) is that the equity of redemption is in a sense an estate in the land, and that the mortgagee holds the land in this sense as a trustee to give effect to that estate or interest. When the entity for which the interest is dissolved there is an equitable interest which has no owner and falls within *bona vacantia*. Then I would refer your Lordship to *Middleton v. Spicer*. (3) The result of that case, I submit, is that where you have a legal interest created and an equitable liability attached to that interest, the fact that the equitable liability ceased by the cesser of its owner ought never to enure for the benefit of the legal owner. The Lord Chancellor held that the mortgagee held that equitable interest on trust, and could not claim that it should by reason of the cesser enure for his benefit as against the Crown. If it is once established that the equitable interest of the mortgagor is property, it continues to exist notwithstanding the extinction of the owner. The mortgagees could only become absolute owners by foreclosure. *Hastings Corporation v. Letton* (1) has really no bearing on this case. All that it decided was that the legal interest of a corporation in a term was limited to the life of the corporation. That case has been doubted by many learned authorities. The same reasoning was applied in *In re Woking Urban District Council (Basingstoke Canal) Act, 1911* (4), to freeholds. It was held that when the ownership of the freeholds came to an end the land went back to the grantor. Peterson J. followed the same line of decisions in *In re Albert Road, Norwood* (Nos. 56 and 58) (5), and these cases were all cited as good

(1) [1908] 1 K. B. 378.

(3) (1783) 1 Bro. C. C. 201.

(2) (1657) Hardres, 465.

(4) [1914] 1 Ch. 300.

(5) [1916] 1 Ch. 289.

law by Lord Sumner in *Morris v. Harris*. (1) I submit that the Crown is entitled to the equity of redemption as bona vacantia.

[FARWELL J. I will now hear you again, Mr. Hodge.]

R. H. Hodge. I submit that there never was in this case the relation of trustee and cestui que trust between the mortgagees and mortgagor. In all the cases Mr. Crossman has cited there was ab initio the relationship of trustee. In *Middleton v. Spicer* (2), and all the cases cited by Wright J., the executor had held as trustee and not beneficially. In *Beale v. Symonds* (3) it was held that where a mortgagor in fee died intestate and without heirs, the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to debts. I submit that there is no substantial distinction between a mortgage of freeholds and a mortgage of leaseholds. The Crown only takes as bona vacantia goods that have no owner. Here there is an owner, the mortgagees, in whom the whole term is vested. The interest in the equity of redemption is merely a right of action for the mortgagor to require a reconveyance on repayment—a chose in action. If the Crown can claim the equity of redemption it will mean that the debt to the mortgagees was extinguished by the dissolution of the company. They cannot sue the Crown, but the Crown can claim redemption whenever it thinks right. It cannot be barred by statute, and the mortgagees will hold the property subject to a special option by the Crown to buy back the property at any time if it becomes worth while to do so. The result of the dissolution will be to annihilate the contract in the mortgage. Wright J., in *In re Higginson & Dean* (4), considered this question and was not satisfied, and he says: “It would, however, I think, . . . be judicial legislation to declare the Crown entitled to maintain actions in such cases except where it can allege a trust.” Now I submit that there was no element of trust in this case as between the mortgagees and the company.

(1) [1927] A. C. 252, 259.

(2) 1 Bro. C. C. 201.

(3) (1853) 16 Beav. 406.

(4) [1899] 1 Q. B. 325, 332.

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FARWELL J. [after stating the facts, continued:] It is important to bear in mind in this case that the transaction between the company and the trustees took the form of an absolute assignment of the whole terms, subject to the equity of redemption, because it may very well be that, if the mortgage had been effected in some other way, different considerations would have arisen.

The question which I have to determine is, what is the result of what has happened? Has the equity of redemption gone, so that the mortgagees are now in the position of absolute owners of the terms, without the right in any one to come in and redeem the property, or is the true view, as Mr. Stafford Crossman, on behalf of the Attorney-General, contends, that the equity of redemption immediately on the dissolution of the company vested in the Crown as *bona vacantia*, and that the Crown is now entitled to redeem the property?

The nature of *bona vacantia* is stated in Blackstone's Commentaries, to which Mr. Stafford Crossman has referred me. In the 8th ed., vol. i., p. 298, there is this statement: "Besides the particular reasons before given why the King should have the several revenues of royal fish, shipwrecks, treasure trove, waifs and estrays, there is also one general reason which holds for them all; and that is because they are *bona vacantia*, or goods in which no one else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder, and so continued under the imperial law." There the word used is "goods," and if the rights of the Crown were limited to chattels no question would arise, because an equity of redemption is not a chattel. The mortgagees, however, have not put forward any such contention, and although there is a question as to whether it extends to choses in action, in my judgment *bona vacantia* cannot be limited to what are, strictly speaking, chattels.

Now, the question as to what is the result of the dissolution of a legal entity such as a company capable of owning, and having been the owner of property, is a question of some difficulty and has been considered in more than one reported

case. The position at the present time is to some extent regulated by s. 296 of the Companies Act, 1929, which provides as follows: [His Lordship then read s. 296 and continued:] That section is not, in my judgment, retrospective. It provides what is to happen to such property as from the passing of the Act, but, in my judgment, it does not operate so as to give the Crown any right in property which it had not got prior to the passing of that Act, and that being so does not assist me.

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Now I think that it is important in considering this question, in order to prevent confusion of thought, to disregard the fact that the mortgagees are trustees for other persons. That they have in fact invested trust moneys in this mortgage, and that they hold whatever is represented by those trust moneys in trust for other persons, is not relevant in any way to the question which I have to determine, and to refer to them as trustees because they are in that sense trustees tends to confuse the issue. Therefore, I propose to refer to them hereafter in this judgment as mortgagees, and to disregard, for the purpose of considering the legal right as between themselves and the Crown, the fact that they are trustees of the terms for other persons. The question to be determined is the same, whether the mortgagees are in the fact the beneficial owners of the money advanced on the mortgage, or whether they held the mortgage upon trust.

The importance of recognizing this is of course apparent if the true view be, as in my judgment it is, that the question whether the Crown can successfully assert a claim as *bona vacantia* to property, or an interest in property which is vested in some person, depends upon whether or not that person holds the property claimed by the Crown as *bona vacantia* as a trustee for some person or legal entity on some trust which has wholly and completely failed.

As I understand the learned and careful judgment of Wright J. in the case of *In re Higginson & Dean* (1), he took the view, with which I respectfully agree, that the only cases

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where the Crown can maintain an action to recover as bona vacantia property or money in the hands of another person is where the Crown can show that the property or money is held upon a trust which has failed. If that be so, for the Crown to succeed in this case it must establish that the mortgagees held whatever interest, or property, or estate the company had in these sub-leases as trustees for the company. The case of *In re Higginson & Dean* (1) is very instructive in considering the question I have to determine. In that case a company was a creditor of a bankrupt. It proved in the bankruptcy, and therefore became entitled to a share of any assets which were available for division among the creditors. The company, while the bankruptcy was still on foot, was dissolved. Subsequently property of the bankrupt was found which proved to be of value, with the result [that after the dissolution of the company money was in the hands of the trustee in bankruptcy which was available for distribution among the creditors, and the question immediately arose what was the duty of the trustee in regard to that money, so far as that portion of it went to which the company would have been entitled had it remained in existence. The trustee, of course, made no claim to the money himself. He admittedly held it as trustee, held it or would have held it in trust for the company had it been in existence. That is an important point. The fact that he was trustee of other moneys for the other creditors, as in this case the mortgagees are trustees of the terms for other persons, is not the material point. The material point in *In re Higginson & Dean* (1) was that the trustee was a trustee of the money in his hands for the company, or would have been so had the company been in existence, and it was on that fact that the decision was founded.

The case first came before the county court judge, who decided that the money in the hands of the trustee in bankruptcy, which would have been payable to the company had the company been in existence, was divisible among the other creditors. From that decision the Crown appealed,

(1) [1899] 1 Q. B. 325.

and appealed successfully, the Court, which consisted of Wright and Darling JJ., reversing the decision of the county court judge. Their judgment, which was a written judgment, was delivered by Wright J., and was obviously written after the whole matter had been considered by him with the greatest possible care, and after reviewing many authorities. The conclusion to which the Court came was that the Crown's claim must succeed, and the ground of the decision was that the trustee in bankruptcy held the money in his hand as trustee for the company, but since the company had ceased to exist, the trust had wholly failed. The money was there, the trustee was not entitled to put the money in his own pocket, and the only person who could have a claim to the fund, i.e., the company, had ceased to exist. In those circumstances the Court said: This is a clear case of bona vacantia; there is money in the hands of a trustee, money to which neither the trustee nor any beneficiary now in existence can make a beneficial claim at all, and in those circumstances the only legal entity which can establish a claim to it is the Crown.

That is the effect, as I understand it, of the decision in that case, and the whole of that decision was based, in my judgment, on the fact that the trustee in bankruptcy had money in his hands as trustee for a beneficiary which had ceased to exist. If the trustee in bankruptcy could have shown that he himself had a good title to the property in his own right, then it would have prevailed against the Crown. The trustee did not attempt to establish that; he had no one whom he could pay, because the only person entitled had ceased to exist, and consequently the Crown became entitled. Now, if that be the true view of that decision, in a case of this kind, where some person has in his hands property or money to which the Crown makes a claim as bona vacantia, such claim can only be made successfully where the Crown can show that the property or money which it claims is held by that person as a trustee for some person or legal entity which has ceased to exist. Unless the Crown can establish that, in my judgment it cannot succeed in a claim of this kind.

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The position here is that the mortgagees have had since the date of the mortgage the whole of the terms vested in them, but there was reserved to the company the equitable right to redeem, and the question is, does that equitable right to redeem now belong to the Crown, so that it is now, and has been ever since the dissolution of the company, in a position to redeem, or is the true view that the equity of redemption having been in a legal entity which has ceased to exist, there is no longer in existence any person or entity who can enforce the equity that was formerly in the company, with the result that the mortgagees remain absolute owners of the term.

Now, first of all, what is the relation of a mortgagee to a mortgagor with regard to the equity of redemption? Is it true to say that the mortgagee is in any sense a trustee of the equity of redemption for the mortgagor? It is not disputed that, if the mortgaged property is sold, and the mortgagee has in his hands sufficient moneys to discharge his debt, principal, interest, and costs, and there is no other mortgage, he holds the balance in his hands as trustee for the mortgagor. Had this property been sold by the mortgagees prior to the dissolution of the company, and had the position been on the dissolution of the company that the mortgagees had in their hands moneys representing the proceeds of the sale, which were in excess of the amount required to repay them their debt, then in my judgment the Crown would have had a good title to those moneys. The position would have been similar to that in *In re Higginson & Dean*. (1) The mortgagees would then be in the position of having moneys in their hands to which they could make no beneficial claim, payable to a legal entity which had ceased to exist, and the Crown would in that case have been entitled to the moneys. That, however, is not what happened. The position was that the equity of redemption immediately before the dissolution was in the company. Now, in my judgment, although, as I have said, in some respects and in some cases a mortgagee may be a trustee for the mortgagor, it is not true to say that the mortgagee is a trustee for the mortgagor of an equity of

(1) [1899] 1 Q. B. 325.

redemption. The equity of redemption is an equitable interest in the land, in that the mortgagor has the right to recover it on payment of what is due, but I cannot understand how it can be said that the mortgagees are trustees of that interest. It is an interest which is in a sense opposed to the interest of the mortgagees, since so long as the equity of redemption is subsisting the mortgagees may be deprived of the estate, which is vested in them by the mortgage, upon payment of the debt due to them. In these circumstances I fail to see how any relationship of trustee and cestui que trust can arise between the mortgagee and mortgagor, so far as the equity of redemption is concerned, and in my judgment on that ground alone the claim of the Crown cannot succeed.

The same result may be reached on different grounds. So long as the equity of redemption is subsisting the mortgagor has an interest in the land, an interest which he can dispose of quite irrespective of the mortgagee. He can, for instance, surrender it to the mortgagee; he can sell it, he can dispose of it to anyone else for value. A mortgagee is certainly entitled to accept a surrender from the mortgagor, and in so doing he is not hampered by any question of a trustee making a profit out of his trust, or dealing with his cestui que trust, or anything of that kind. He is free to bargain with the mortgagor as to and to accept a surrender, and if, immediately prior to the dissolution of the company, the company had surrendered the equity of redemption to the mortgagees, and then had gone out of existence, in my judgment the mortgagees would then have been in the position of absolute owners. Unfortunately for the mortgagees, that was not done. Apparently the liquidator held the view that the equity of redemption was of no value, took no steps whatever to try to dispose of it, nor did he take the trouble to surrender it to the mortgagees. He simply left the whole thing alone, and the company disappeared from the scene altogether. Now what is the position? In my judgment the position is this, that whereas there was immediately prior to the dissolution of the company a legal entity entitled to redeem, that legal

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entity ceased to exist, with the result that the term that was vested in the mortgagees, subject to the right of the company or its assignee to redeem, remains in the mortgagees, but without any right in any person or legal entity to interfere with their possession. The right to recover the property on payment of the debt is a right that was in the company; the company is no longer there to assert the right, and in my judgment in those circumstances that right can no longer survive. If the Crown's claim were to succeed, the position would be unfortunate from the point of view of the mortgagees. The mortgagees would have no right to sue the Crown on the covenants in the mortgage; no Statute of Limitations would apply, and the position of the mortgagees would certainly be very much worse than it was prior to the dissolution of the company. If I am right, the dissolution of the company enures for the benefit of the mortgagees, because the mortgagees have now an estate of which they cannot be deprived by any other person coming to redeem. In my judgment the true result of what has happened is, that there is now in existence no legal entity or person who can interfere with the estate, which under the assignment was vested in the mortgagees, and the mortgagees have become and now remain absolute owners of the terms.

I should add this, that since the dissolution of the company the rents of these properties have increased, and for some time now they have been more than sufficient to keep down the interest, so that the mortgagees have in their hands moneys representing surplus rents; but that cannot affect the matter, because the position of the Crown cannot now be any different from the position it was in immediately after the dissolution of the company. That is the vital moment at which to consider the relative position of these parties. If the true view be, as I think it is, that after the dissolution of the company the mortgagees had an estate which was freed from any right in anyone to redeem, then the moneys in their hands representing surplus rents are their property and the Crown has no claim to them.

On both grounds, therefore, I have come to the conclusion that the claim of the Crown to the equity of redemption has not been established.

Solicitors: *Herbert Smith & Co.*; *Solicitor to the Treasury.*

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Industrial and Provident Society—Winding Up—Shares—Rule allowing Withdrawal at Six Months' Notice of Money paid up on Withdrawable Shares—Notices of Withdrawal—Resolution of Board to call Extraordinary General Meeting—Notice of Meeting—Winding Up Resolution passed while some Notices of Withdrawal unexpired—Right of Shareholders to Repayment—Going Concern—Analogy to Building Societies—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 60 (e).

By the rules of an industrial and provident society incorporated under the Industrial and Provident Societies Act, 1893, with a capital consisting partly of withdrawable and partly of transferable shares, holders of withdrawable shares could at any time give six months' notice in writing to receive back the money paid up on their shares. An association which was a member of the society gave notice dated October 18, 1929, to withdraw some of its shares, and another notice dated November 5, 1929, to withdraw more of them. On March 18, 1930, the society's board of directors resolved to send out a notice calling an extraordinary general meeting of the society, and the notice was sent out on April 8, 1930. The notice was accompanied by a circular showing that the continuance of the society was practically impossible. The meeting was held on April 30, 1930, and a resolution to wind up was passed. On a summons by the liquidator asking, *inter alia* (a) whether notices of withdrawal unexpired before the date of the notice calling the extraordinary general meeting but expired before the date of the winding-up resolution were effectual; and (b) whether the personal representatives of deceased holders of withdrawable shares who had died before the commencement of the liquidation were entitled by reason of the deaths of those shareholders to any priority in respect of repayment:—

Held, by the Court of Appeal (affirming the decision of Maugham J.), that the association, having had notice during the currency of its

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withdrawal notices of circumstances which showed that the society could no longer carry on its business as a going concern, was not entitled to repayment on the maturing of its notices.

Held, also, that notwithstanding s. 60 (e) of the Industrial and Provident Societies Act, 1893, the rule as to notices of withdrawal in the case of building societies first laid down in *Carrick v. North British Building Society* (1885) 22 S. L. R. 833, and followed in subsequent building society cases, was equally applicable in the case of industrial and provident societies.

Held, also, by Maugham J., that personal representatives of deceased shareholders were not entitled to any priority.

In re Ambition Investment Building Society [1896] 1 Ch. 89; *In re Sunderland 36th Universal Building Society* (1890) 24 Q. B. D. 394 applied.

SUMMONS by the liquidator in the winding up of the United Citizens Investment Trust, Ltd. (hereinafter called "the Society") for the determination by the Court (*inter alia*) of the question of the validity of certain notices of withdrawal which had been given by holders of withdrawable shares in the Society.

The facts are fully stated in the judgment of Maugham J., and are shortly as follows:—

The Society was registered in 1927 under the Industrial and Provident Societies Act, 1893, having as its main object the carrying on of the business of an investment trust. Rule 3 of Part I. of the Society's rules provided: "Share capital. (1.) The share capital of the Society shall be in shares of ten shillings each in two classes, namely, transferable and withdrawable. (2.) No payment of withdrawable capital shall be made while any claim due on account of any deposit is unsatisfied, but subject as aforesaid the holder of any withdrawable shares may at any time give notice in writing to receive back the sum paid upon such shares, and upon the expiry of such notice shall be due and entitled (*sic*) to receive the said sum, whereupon such shares shall be cancelled. The length of the notice required by this rule shall be six calendar months, but the Board may at their discretion reduce such length of notice to such a term not being less than six days as they may think fit. (3.) On the issue of any shares the Board shall at their discretion be entitled to charge an entrance fee at a rate not exceeding sixpence per share or

such other sum as may from time to time be fixed by a general meeting." One of the members of the Society was the United Women's Homes Association, Ltd. (hereinafter called "the Association") which was also registered under the Industrial and Provident Societies Act, 1893, and held 69,000 withdrawable and 23,000 transferable shares in the Society. The Association gave notice, dated October 18, 1929, to withdraw 30,000 of its shares, and another notice, dated November 5, 1929, to withdraw another 32,000. On March 18, 1930, the board of directors of the Society passed a resolution that a notice should be sent out calling an extraordinary general meeting of the Society. The notice was sent out on April 8, 1930, and the meeting was held on April 30, 1930, when a resolution to wind up the Society was passed.

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This summons was taken out on January 8, 1931, by the liquidator, and it asked for the decision by the Court (*inter alia*) of the following questions:—

1. Whether, having regard to the issue on April 8, 1930, by the directors of the Society to the shareholders of a notice convening an extraordinary general meeting to consider and, if thought fit, pass a special resolution for the voluntary winding up of the Society, to the circular accompanying the notice, and to the financial position of the Society at that time, notices of withdrawal which had been given in respect of withdrawable shares and had not expired at the date of the notice, but had expired before the date of the resolution to wind up, were effectual or not.

1A. Whether the liquidator ought to apply the net surplus assets of the Society remaining after discharge of the costs of the liquidation and the debts and liabilities of the Society in payment of the following items, and in the following order of priority: (A) the capital paid upon withdrawable shares (if any) in respect of which effectual notices of withdrawal had been given and had expired before the date of that resolution *pari passu*; (B) the capital paid up on all other withdrawable shares and on all transferable shares *pari passu*, or, if not, that it might be determined what was the correct

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order of priority as between (i.) withdrawable shares coming under head "A" aforesaid; (ii.) withdrawable shares as to which notice of withdrawal had been given and had not expired before the notice of April 8, 1930, but had expired before the resolution; (iii.) withdrawable shares as to which notice of withdrawal had been given but had not expired before the resolution; (iv.) withdrawable shares as to which no notice of withdrawal was given before the resolution; and (v.) transferable shares.

1B. Whether the personal representatives of deceased holders of withdrawable shares who died before the commencement of the liquidation of the Society: (i.) were entitled to priority over the holders of all or some and which of the other shares in the Society in respect of the repayment of the capital paid up on those withdrawable shares, or (ii.) were not entitled to any priority by reason of the death of the member.

Wilfrid Hunt for the liquidator.

N. L. C. Macaskie K.C. and *Harold Christie* for the Association, the first of whose two notices of withdrawal had been given and had expired before the date of the resolution to wind up, but after the date of the notice of the meeting at which the resolution was passed, and the second of whose two notices had been given but had not expired before the date of the resolution.

F. R. Evershed for a holder of withdrawable shares who had given notice of withdrawal expiring before the date of the resolution.

R. H. Hodge for a holder of withdrawable shares who had given before that date a notice of withdrawal expiring after it.

H. Wynn Parry for a holder of withdrawable shares who had given no notice of withdrawal before that date.

Cecil Turner for a holder of transferable shares.

B. S. Tatham for the personal representative of a deceased holder of withdrawable and transferable shares.

MAUGHAM J. The Society was registered in 1927 under the Industrial and Provident Societies Act, 1893. The rules

provided that the objects of the Society were "to carry on the business of an investment trust," and certain other objects. Rule 3 of Part I. of the rules was as follows: [His Lordship read the rule and continued:] I pause there to say that there is obviously a slip in the printing or the framing of sub-rule 2, because the phrase "due and entitled to receive the said sum" cannot be applied to the holder. Obviously I think that it means that the sum paid upon the shares shall become due, and he shall be entitled to receive that sum.

It was provided in Part II. of the rules that "this part of these rules shall be read in conjunction with Part I., but so that in the case of any conflict or inconsistency between the two parts the specific provisions of Part I. shall prevail and any contradictory provisions of this part shall be of no effect." The general rules contained a number of provisions usual in the case of societies of the kind. Rule 5, sub-rule 1, provided (inter alia) that "no member (other than a registered society under the Industrial and Provident Societies Act, 1893) shall hold an interest exceeding 200*l.* in the shares of the Society." That points to this fact, which, of course, is common to societies registered under the Industrial and Provident Societies Act, 1893, that the members are intended, or expected, for the most part to be working men and women, an observation that may have some bearing on the view that I shall take of the questions to be decided at the present time.

The rules provided for shares of the amount stated in rule 3 of Part I. of the rules, the shares to be numbered consecutively and entered in the share register, and for certain transfers of shares, subject to the consent of the Board, to other members of the Society or to any person accepted by the Board as a member. The Board had complete control of the transfers, except transfers to members. Rule 6, sub-rule 1, provided that "the Society shall have a lien on the shares of any member for any debt due to the Society from him, whether by way of trade or otherwise"; and sub-rule 3 of rule 6 was as follows: "Subject to Part I.

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C.A. of these rules the Board shall have power to repay to
1931 any member the amounts credited upon his shares or any
UNITED part thereof, and any shares so repaid shall forthwith be
CITIZENS cancelled.”
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In my opinion that rule applies both to transferable and to withdrawable shares, but it is to be observed that it merely gives an option to the Board, and confers no right on the holder of the shares such as is conferred by rule 3, Part I.

Rule 7, sub-rule 2, provided that “the Board shall keep at the registered office of the Society a list of the names of all persons who cease to be members under these rules. The inclusion or omission of the name of any person from this list of members shall, in the absence of evidence to the contrary, be conclusive that such person is or is not a member of the Society.”

Rule 8 provided for borrowing powers vested in the Board ; rule 9 for repayment of capital, under certain circumstances, at the Board’s discretion, and rule 10 for general meetings of the Society. Rule 11 provided as follows: “(1.) The business and government of the Society shall be in the hands of a Board of Directors, one of whom shall be the Managing Director, which shall consist of not more than eleven and not less than three members of the Society”; and there were the usual provisions with regard to directors of the Society not very unlike provisions found in the case of limited companies. Rule 23, sub-rule 1, provided as follows: “The Board, shall, after providing out of the income of the Society the necessary sums to meet all working expenses, costs of upkeep and administration of property, interest upon loans, loan stock, thrift notes, deposits, mortgages, and other charges, set aside such sums as they think proper,” for the purposes in the rule set out. Sub-rule 4 of that rule stated how the profits of the Society in any year were to be employed, the first thing provided for being “remunerating the Board at such a rate as the general meeting shall determine.” The second matter mentioned was payment of a dividend, with a provision that no larger dividend should be declared than was recommended by the Board. Rule 28, the only rule

referring to dissolution, provided that "the Society may at any time be dissolved by consent of three-fourths of the members, testified by their signatures to an instrument of dissolution in the form provided by the Treasury Regulations, or by winding-up in manner provided by the Industrial and Provident Societies Acts." Rule 30 provided for the possibility of an amendment of the rules.

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The Society carried on business with reasonable success up to 1929. One of its members was the United Women's Homes Association, Ltd. (hereinafter called "the Association"), which was also registered under the Industrial and Provident Societies Act, 1893, and held 69,000 withdrawable and 23,000 transferable shares in the Society. By a letter dated October 18, 1929, the Association applied for the repayment of 30,000 of its withdrawable shares, and by a letter of November 5, 1929, it applied for the repayment of a further 32,000 of those shares. At the end of 1929 the number outstanding of fully paid withdrawable shares of ten shillings each was 153,517, and of fully paid transferable shares 54,135. There were seven partly paid transferable shares, which were paid up after the date hereinafter mentioned of the liquidation of the Society. The withdrawable shares were sometimes described in the Society's proceedings as transferable shares, and the transferable shares were sometimes described as ordinary shares. All those denominations were clearly inaccurate. It was, however, the practice of the Board to allot shares to applicants in the proportion of one transferable share to three withdrawable shares, so that in fact any particular shareholder of the Society, except in unusual cases, was a holder of both transferable and withdrawable shares. When the accounts were audited for the year 1929, it was ascertained that the investments of the Society had undergone, in common with the investments of nearly every society of the same character, considerable depreciation. The result was that, although the Society was perfectly solvent from the point of view of creditors properly so called, notices to repay withdrawable shares would have the effect of seriously depleting the assets of the Society,

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and might ultimately result in the owners of the non-withdrawable shares being left as members of a society which had not nearly sufficient means to discharge those shares in full.

The position of the Board, therefore, was a somewhat curious one. As I have pointed out, nearly every member held shares of different classes, but no doubt there may have been, and there probably were, a number of transfers after the formation of the Society, and it would be contrary to the interests of the members of the Society as a whole to continue to carry on business if, as a result of the continuance, all well advised holders of withdrawable shares were to withdraw their funds from the Society. On the other hand, it is manifest that there never has been any question of the solvency of the Society in a legal sense. I do not propose, therefore, to investigate the facts disclosed in the various balance sheets which have been put before me, or the report of Sir Harry Peat, which was obtained by the directors as a result of the position into which the Society was drifting. There was a meeting of the Board of Directors of the Society on March 18, 1930, and the minutes of that meeting are as follows: "Arising on the minutes the chairman"—Mr. Stanley G. Lawrence—"reported that Sir Harry Peat had conducted an investigation into the affairs of the Trust," i.e., the Society. "Mr. Whatmore"—a gentleman representing Sir Harry Peat—"stated (a) that, as a result of the investigation made, it appeared that approximately half of the share capital of the Trust had been lost, and that a reconstruction would involve the writing off of five shillings of each ten shillings share. (b) With regard to withdrawable shares on which notice of repayment had been given, counsel had advised that unless all those withdrawable shareholders who had given notice requiring repayment of withdrawable shares withdrew such notice, then possibly a reconstruction scheme, even if sanctioned by the requisite majority, could be successfully attacked by such withdrawable shareholders unwilling to assent to the scheme. There appeared to be considerable difficulty in overcoming such obstacle. (c) Even if a reconstruction scheme were carried, notices might continue to be

received requiring repayment at five shillings per share, and, having regard to the Trust's investments and to the Bank overdraft of approximately 35,000*l.*, the Trust might find itself in difficulties even after reconstruction. (d) Sir Harry Peat had obtained the consent of three gentlemen of considerable experience of Investment Trusts to undertake the management and administration subject to a satisfactory reconstruction. (e) In his opinion the net income of the reconstructed trust would probably not amount to much more than 2000*l.* per annum, assuming that the average yield on the net capital amounted to six per cent. per annum, and assuming that no income were to be derived from underwriting commission, etc. (f) Liquidation would mean prospects of an early return of capital to shareholders who, if they wished, could reinvest in satisfactory securities which would yield a better return than could be hoped for for some time from the shares of the reconstructed Trust. After full consideration it was resolved: That in the opinion of the directors the interests of shareholders could best be served by winding up the Trust, and that the necessary arrangements be made to put such recommendations before the shareholders without delay in accordance with the draft letter and resolution filed in the appendix to these minutes. It was resolved: That the notice calling an extraordinary general meeting be accompanied by an audited statement of accounts for the year ending December 31, 1929." I may say that I think that the advice given by Sir Harry Peat, as far as I have been able to judge from the balance-sheets and other facts laid before me, was perfectly right and sound. For some reason which I do not quite understand, the resolution of the Board passed, as I have said, on March 18, was not followed up immediately, and it was not until April 8, 1930, that a notice was sent out calling an extraordinary general meeting of the Society. The meeting was held on April 30, 1930, and the following resolution passed as a special resolution: "That the Society be wound up voluntarily, under the provisions of the Companies Act, 1929, and the Industrial and Provident Societies Acts, 1893 to 1928, and

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C. A. that Sir William Henry Peat, K.B.E., chartered accountant,
1931 of 11 Ironmonger Lane, London, E.C. 2, be appointed
liquidator for the purpose of such winding up." The liqui-
UNITED dator has paid off claims to the Society's bankers amounting
CITIZENS to 32,000*l.*, and has paid off other creditors of the Society,
INVESTMENT not including in that phrase the shareholders whose notices
TRUST, LD., to pay off withdrawable shares were received and matured
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It is not surprising, having regard to the form of the rules in this case, and the difficult legal questions which arise (which have not been greatly simplified by the authorities to which I have had to refer), that the liquidator desires to obtain the assistance of the Court in determining which of these holders of withdrawable shares are to be treated as creditors in the liquidation of the Society and which of them remain in the position of shareholders. The summons, which was taken out in January, 1931, by the liquidator, asked for the determination (*inter alia*) of the following questions. [His Lordship read questions 1, 1A, and 1B, and continued:] Turning back now to the main rule which must occupy my attention—namely, rule 3, sub-rule 2, of Part I. of the rules, it is clear that that rule ought to have some qualification. For example, it is quite impossible for it to apply to holders of withdrawable shares who give notice after the winding-up resolution. It is plain in my opinion that the rule is contemplating a position in which the Board of Directors, who have to give directions for the signing of a cheque, will be an acting board and will be in a position, on the expiration of the notice, to pay the sum which will have become due to the holder of withdrawable shares who has given the notice in question. The main question that I have to decide is when and in what circumstances the holder of the withdrawable shares becomes a creditor of the Society in lieu of being a shareholder and, so to speak, a partner in a going concern. It is not immaterial to note that the notice, although in the first instance it had to be and in fact remained a six months' notice, might have been reduced to six days. I will say here, by way of preface to what I am going to decide, that the

material date, from the point of view of the Society as a whole and from the point of view of the possibility of the Board's being able to carry out its duties, is the date when the notice, whether it be six months or six days, expires. The rule in my opinion clearly points out that when the notice matures the member becomes entitled to receive the sum which he has paid up on his share, and becomes a creditor of the Society.

There is a great paucity of authority on cases of this character arising with regard to societies registered under the Industrial and Provident Societies Acts. There is, however, a considerable amount of authority with regard to similar cases arising on the winding up of building societies. I think that it will be useful if I go through the more material of those cases for the purpose of extracting from them anything which will help me to decide this case correctly.

The first case to which I wish to refer is *Brownlie v. Russell* (1), the leading judgment in which is that of Lord Selborne L.C. The main question was whether a member who had not received an advance and who was entitled under the rules to withdraw the whole or any portion of his shares by giving a notice was entitled to be treated as a creditor. There were no outside creditors. In February, 1880, the society was ordered to be wound up voluntarily. In July, 1880, a member gave notice under the rules of withdrawal to the liquidators and therefore claimed to be a creditor. The liquidators denied his right to withdraw after liquidation unless he paid up the whole of a certain loan. The material part of Lord Selborne's judgment is the passage in which, after referring to the winding-up order, he says (2): "I think that it prevents the exercise of the option of retiring or withdrawing which was given to all the members, to the unadvanced members under the 9th rule and to the advanced members under the 12th; as to which I hold that the rules contemplate a going concern. That is consistent with the opinion expressed by Vice-Chancellor Wood in the case before him" (*In re Doncaster Permanent Building Society* (3)) "who

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(1) (1883) 8 App. Cas. 235.

(2) *Ibid.* 254.

(3) (1866) L. R. 3 Eq. 158; (1867)

L. R. 4 Eq. 579.

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spoke of the winding-up order as substantially putting a stop to the whole thing. It takes away the option which otherwise, if the concern had been a going one, would have belonged to each member—it, by a *vis major*, as the Vice-Chancellor said (1), puts a close to the whole concern—it terminates, at that date, the account of each shareholder—it cuts off all chance of profit which, if the thing had gone on, both classes of members might have had under the 5th rule. It is equivalent, not to an optional withdrawal or retirement by individual members, but to a compulsory withdrawal by the operation of the winding-up order as against them all.”

The point there arose in the case of a member of a building society who gave notice after the liquidation, and in my opinion the principle of that decision assists me in coming to the conclusion which I should have reached without that assistance—namely, that rule 3, sub-rule 2, of Part I. of the Society’s rules does not permit any withdrawal after the date of the liquidation.

There were a certain number of other cases, in particular *Walton v. Edge* (2), before the matter came before the Court of Appeal in *In re Sunderland 36th Universal Building Society*. (3) In that case there was a somewhat special rule providing that “On and after the expiration of the first twelve months, any member may withdraw the subscription money which he may have contributed, with such an amount of interest as may be determined by the committee, such member to give notice of his intention to withdraw in writing to the secretary, and should more than one member give notice to withdraw at one time, the member so giving notice shall be paid in rotation, according to the priority of notice, provided always that the said society shall not be required or obliged to make such payment as aforesaid, until they have sufficient funds in hand for that purpose and also to meet the then existing liabilities of the society.” It was held “that the rule provided only for withdrawal from the societies while they were or were believed to be solvent, and that,

(1) L. R. 4 Eq. 579, 587.

(2) (1884) 10 App. Cas. 33.

(3) 24 Q. B. D. 394.

therefore, notices of withdrawal which were given or which matured at a time when the societies were known to be insolvent, though before the actual date of the winding-up order in each case did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding-up." I must not, of course, forget, in considering anything that may be decided in such a case as this, that, substantially, the whole point to be determined was a question of construction of the rules of the particular society. Apart from that fact, however, I do not think that there is any great difference between the principle to be applied in relation to the question of withdrawal or effective withdrawal as between a building society and a provident society. The judgment of the Court, consisting of Lord Coleridge C.J. and Mathew J., was delivered by Mathew J., who, after referring to the rule which I have shortly stated, says (1): "We are of opinion that this rule was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities." I think that he is there referring not only to outside creditors but to members of the society themselves. He goes on: "It would be altogether unreasonable to suppose that it was intended in the event of insolvency to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be, still solvent. There was sufficient evidence to shew that before the times at which two of the notices were given, and the third became effective, the members, and all others who were interested, knew that the societies were no longer in a condition to carry out the objects for which they had been formed, or to fulfil their undertakings with their members. That the societies could not go on is shewn from the scheme of

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(1) 24 Q. B. D. 394, 403.

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reconstruction laid before the members, which practically involved the liquidation of the affairs of each of the societies. In this state of things the right to withdraw, it appears to us, no longer exists."

In 1893 the matter came before North J. in *Barnard v. Tomson*. (1) It was again a case of a building society, and again there was a rule as to withdrawal by members, providing that (2) "any member not having received an advance who may be desirous of withdrawing from the society shall, by giving one month's written notice to the directors at one of the monthly meetings, and leaving his pass-book at the chief office, be entitled to withdraw the amount standing to his credit in the books of the society:" and there was a provision that if more than one member gave notice to withdraw at one time they should be paid in rotation according to priority of notice. North J. went carefully through the preceding cases, including *Walton v. Edge* (3) and *In re Sunderland 36th Universal Building Society*. (4) In the course of his judgment he said, referring to the latter case (5): "The ground, therefore, of the decision in that case is perfectly clear. And, following that case entirely, I have to inquire whether such a state of things, as it was there held would put an end to the right to withdraw, existed in the present case. Can it be said here, to adopt Lord Selborne's words in *Walton v. Edge* (3), that there was any information that a winding-up was going to take place, or anything special to affect the members with notice that the society was not to continue as a going concern? Or, to take Mr. Justice Mathew's words, was there here any 'state of things which, to the knowledge of all concerned, renders liquidation inevitable'? My answer to those questions is, No." In the result he held that there was nothing before the instrument of dissolution to indicate such a state of things as would put an end to the operation of the existing rule upon the principles laid down in the cases to which he had referred; and he concluded by

(1) [1894] 1 Ch. 374.

(3) 10 App. Cas. 33.

(2) *Ibid.* 377.

(4) 24 Q. B. D. 394.

(5) [1894] 1 Ch. 374, 388.

saying (1): "It seems to me, therefore, that all the notices to withdraw are good down to that time, subject to this, that with regard to Mr. Yates" (a holder of fully paid shares who, less than a month before the deed of dissolution was executed, gave notice of withdrawal) "the cases seem to shew that, in order that a notice should be good, it must be completed by the expiration of the period fixed before the date at which the line is to be drawn. In the present case a month's notice is required, and Mr. Yates' notice had not been running for a month prior to the date of the deed of dissolution. Therefore, he is not entitled to any priority by reason of his notice, but all the other parties are."

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Two years later a similar case, *In re Ambition Investment Building Society* (2), came before Vaughan Williams J. The rules of the society in that case provided that a member might withdraw all or any of his shares upon giving one month's notice to the secretary. He was then entitled to receive back his monthly subscriptions with such interest as the directors, in their opinion, considered that the state of the society's business would allow, and if more than one member gave notice to withdraw they were to be paid in rotation according to priority of notice. Vaughan Williams J., after referring to the cases, expressed the opinion that the decision in *In re Sunderland 36th Universal Building Society* (3) did not intend to lay down the rule that the right to withdraw depends on the knowledge of the members or officers of the society that the society is in an insolvent condition. He then said (4): "I find that the real question proposed by the judges was, 'Had there been a stoppage of the business, or anything equivalent to it?' And they decided that, if there had been, the right to withdraw was determined." He added: "But it has not been held that insolvency of the society, even if known to its officers, is equivalent to stoppage of business; and I propose to deal with the present case on that basis." I should add that he is using the word "insolvency" there in the popular sense, as meaning

(1) [1894] 1 Ch. 374, 390.

(2) [1896] 1 Ch. 89.

(3) 24 Q. B. D. 394.

(4) [1896] 1 Ch. 89, 98.

C. A. insufficient funds to pay the members the amounts which
 1931 they have subscribed. Then, after citing the judgment of
 UNITED Lord Shand in *Carrick v. North British Building Society* (1),
 CITIZENS he observes (2): "That seems to me to shew that he
 INVESTMENT TRUST, LD., recognised that the condition which would determine the
In re. right to withdraw was the stoppage of business or its
 Maugham J. equivalent. When it is considered who are the persons
 whose mutual rights were intended to be regulated by rule 21,
 it seems plain that the stoppage of business, or recognition
 of the fact that it is inevitable—and not insolvency—is the
 proper point at which to draw the line." After expressing
 that view, which I fully adopt as being correct, he continues :
 "The relations of these persons must be borne in mind. They
 have in common put their capital into an adventure or concern
 which it was hoped would yield a profit. There is a proviso
 enabling capital to be withdrawn. How long is the right to
 withdraw capital to continue ? It must continue as long as
 the adventure continues or its continuance is contemplated ;
 but as soon as the adventure comes to an end, or the
 adventurers or their officers recognise that it must come
 to an end, from that moment every principle of justice
 requires that all who have joined in the common adventure
 shall in common bear the loss—and from that time the rule
 as to withdrawal ceases to operate, and there ought to be no
 applications for withdrawal."

It will be noted that there are one or two phrases used
 in that last sentence which may be capable of more than one
 construction, but I do not think that they are intended to
 derogate from the view, which the learned judge had
 definitely expressed, that the stoppage of business or the
 recognition of the fact that it is inevitable, and not insolvency,
 is the proper point at which to draw the line.

Then comes *In re Counties Conservative Permanent Benefit
 Building Society* (3), a decision of Stirling J., as he then was.
 This case is singular as being the case in which it has been
 thought that some one had been guilty of a slip in a date
 under the circumstances to which I will refer. The rules

(1) 22 S. L. R. 833.

(2) [1896] 1 Ch. 89, 99.

(3) [1900] 2 Ch. 819.

provided, as in the other cases, that members might withdraw from the society on giving a month's notice, and that payments of withdrawals should be made according to priority of receipt of notice by the society: they provided also that the directors should have power to limit the number of shares that were withdrawn in any one month and to limit the withdrawals so that they should not exceed one-half of the monthly income from share subscriptions. By a resolution passed on March 23, 1893, the directors determined that the terms of rule 68 limiting the shares withdrawable be enforced. In consequence of members' dissatisfaction with the conduct of the society's business, by a notice dated June 26, 1895, and given under the rules, a special general meeting was summoned for July 10 of that year to consider the advisability of dissolving the society. The meeting was held and was adjourned till August 8, when a resolution for voluntary winding up was passed. The Court had to decide which of the members who had given notices of withdrawal maturing in time were entitled to be paid off as against those whose notices matured at later dates or who had given no notice at all. Stirling J., in a reserved judgment, after stating the facts and referring to rules 67 and 68, which purported to limit the withdrawals, said (1): "I do not think that a notice of withdrawal becomes invalid because there happens to be a large number of notices of withdrawal previously given in a particular month. Then it is said that in giving effect to this rule injustice may be done to the withdrawing member, because he may have a long time to wait for payment, and in the interval he will not be entitled to any interest. All I can say as to that is that a member withdraws at his own option; he is not compelled to withdraw, and if he chooses to withdraw he must take the consequences which are prescribed by the rules of the society of which he has become a member. The result will be, therefore, that the notices which were given prior to the date of the resolution for winding-up will exhaust the whole funds of the society."

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(1) [1900] 2 Ch. 819, 825.

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Having said that, he dealt with the priority of a deceased member and with the question of set-off, with which I am not concerned. He then proceeded (1): "The order will be as follows:—Declare that the defendant as executor of the deceased member James Meadows is entitled to be paid in priority to all members who have given notice of withdrawal, the order in this respect to follow that made by the Court of Appeal in *In re West London and General Permanent Benefit Building Society* (2), and that subject thereto members whose notices of withdrawal matured prior to 26th June, 1895, are entitled to be paid in full and without any deduction in priority to all other members and according to the priority of the receipt of the notice of withdrawal by the society." June 26, 1895, was the date of the notice of the meeting for the purpose of passing the voluntary resolution. It is not a slip of the pen, because later on in the form of the order (3) I find the words "Appoint defendant Norton to represent the class of members whose notices matured prior to 26th June, 1895, and the defendant Cobley to represent the class of members whose notices matured after 26th June, 1895," so that there are three places where Stirling J. has referred to the date of the notice of the meeting. I turn back to the passage where he says (4): "The result will be, therefore, that the notices which were given prior to the date of the resolution for winding-up will exhaust the whole funds of the society." I think that it must be conceded, if the language is examined very carefully, that that observation is made with reference to the fact that he had come to the conclusion that notices of withdrawal were not invalid because there happened to be a large number of them, and with reference also to the argument that had been presented to him that in such a case it ought not to be held that the notices were good: and when he says: "The result will be, therefore, that the notices which were given prior to the date of the resolution for winding up will exhaust the whole funds of the society," he is stating a fact—namely, that the

(1) [1900] 2 Ch. 827.

(2) (1898) 78 L. T. 393.

(3) [1900] 2 Ch. 819, 828.

(4) *Ibid.* 819, 825.

notices had been so numerous that they would exhaust the fund. I do not, however, think that Stirling J. is there saying anything contrary to the decision as contained in the order—namely, that the notices of withdrawal were not good unless they matured before June 26, 1895, the date, as I have said, when the directors of the society sent out notices to consider a winding up. Accordingly I think that, properly considered, there is really only an apparent and not a real discrepancy between the passage to which I have referred in the judgment of Stirling J. and the order which he made.

The authorities to which I have referred are, I think, all those that are relevant to the present case. To my mind, the effectiveness of notices in such a case as the present ought not to be judged by considerations personal to a particular holder of shares. It seems to me impossible, as a matter of construction of rules, that the notice which would be good if given by A. would be bad if given by B. because of B.'s motive, or because of his knowledge of the impending financial troubles of the society. I have no confidence in such a view, and I reject it.

The alternative, I think, is the conclusion at which Vaughan Williams J. arrived in *In re Ambition Investment Building Society* (1) that the stoppage of business, or the recognition of the fact that it is inevitable, is the proper point at which to draw the line: in other words, that the effectiveness of a notice must be judged in relation to the notorious position of the society, not in relation to facts, not known to the members as a whole, which may be within the knowledge of particular officials or of the board, but in relation to the question whether, in a true sense, the society is, at the date when the notice has matured, a going concern still in a position to carry out the objects for which it was formed.

In my opinion, all notices which matured after the date of the notice of April 8, 1930, are inoperative. I think that, in coming to that conclusion, I am following what Stirling J.

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(1) [1896] 1 Ch. 89.

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 1931 *Benefit Building Society* (1) and what I understand to be
 UNITED the true ratio decidendi of the decision of Vaughan Williams J.
 CITIZENS in *In re Ambition Investment Building Society*. (2) I should
 INVESTMENT add that the notice was accompanied by a circular which
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In re. tinuance of the society was practically impossible.
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I have considered whether it would have been possible to contend that the correct date before which notices must mature was March 18, 1930, when the directors' meeting was held at which it was resolved that the interests of the shareholders could best be solved by winding up, and I have come to the conclusion that it would not. As I have already said, the delay between March 18 and April 8 has not been explained, but it may well be that the time was occupied in considering whether some course other than liquidation was possible. Further, I think that the line should be drawn at the date, not when the board considers liquidation desirable, but when the desirability of it becomes notorious. I therefore answer questions 1 and 1A of the summons on those lines.

With regard to the position of the personal representative of a holder of withdrawable shares who died before the commencement of the liquidation, I have not thought it necessary to deal in the course of my judgment with the very few rules of the Society bearing on the matter. It is sufficient, I think, to say that, following the decision of Neville J. in *In re United Service Share Purchase Society, Ltd.* (3), and after carefully considering the Society's rules in relation to the death of shareholders and bearing in mind that no rule requires payment out to the executors of a deceased shareholder, I must come to the conclusion that the personal representative of a deceased shareholder is not entitled to any priority over other shareholders, and does not become a creditor.

(1) [1900] 2 Ch. 819.

(2) [1896] 1 Ch. 89.

(3) [1909] 2 Ch. 526.

The Association appealed in respect of the 30,000 shares of which it had given notice of withdrawal on October 18, 1929. The appeal was heard on November 5, 6, 9, 1931.

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N. L. C. Macaskie K.C. and *Harold Christie* for the appellants. Under the rules of the Society members have contractual right to withdraw at any time and that right is unqualified. This is sufficient to constitute a vital distinction between this case and the authorities to be cited, where the right was qualified. When, therefore, a shareholder holding withdrawable shares has given notice of withdrawal which expires before a winding-up resolution has been passed, he is entitled to be paid in priority to all the shareholders who have given no notice of withdrawal: *In re Blackburn and District Benefit Building Society*. (1) Until the winding-up resolution is passed the Society must be regarded as a going concern and the rights of members are as defined by the rules. The test of the validity of a notice of withdrawal is whether or not at the time the notice was given the giver had any information that a winding up was going to take place. If he had information that a winding-up order was inevitable, the notice might be ineffectual, but otherwise it was good, unless there was a winding up before its expiration: *Walton v. Edge* (2); *In re Ambition Investment Building Society*. (3)

Any decision which suggests that information coming to the giver of a notice during its currency may render the notice ineffectual depends in each case on the construction of particular rules, which differ entirely from the rules in this case. This case is indistinguishable from *In re Ambition Investment Building Society*. (3)

Under s. 60 (b) of the Industrial and Provident Societies Act, 1893, the effect of a notice of withdrawal in the case of shares not fully paid up is that the shareholder ceases to be liable for any debts subsequently incurred by the company,

(1) (1883) 24 Ch. D. 421, 429; in
H. L. sub nom. *Walton v. Edge* (1884)
10 App. Cas. 33.

(2) 10 App. Cas. 33, 36.

(3) [1896] 1 Ch. 89.

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for by s. 60 (e) an individual shall be taken to have ceased to be a member in respect of any withdrawable share from the date of notice of withdrawal. This shows the great importance attached to notices of withdrawal under this Act. There is nothing corresponding to that section in the Building Societies Acts, and for this reason the cases relating to building societies have no real bearing on this case. In any case, there is no authority justifying the view that events prior to a winding-up resolution, such as this notice, can give to the winding-up resolution a retrospective effect.

The next case relied upon by Maugham J. was *In re Counties Conservative Permanent Benefit Building Society* (1), where Stirling J. appears to have thought that members who had given notices of withdrawal before the winding up were entitled to be paid in full, and therefore that up to the winding up the notices were effective. In that case neither the *Sunderland* case (2) nor the *Ambition Investment Co.'s* case (3) was referred to either in the arguments or the judgment. The case affords no support to Maugham J.'s decision.

[LAWRENCE L.J. It is perfectly clear that the main point in that case was different from that in this case.]

There are therefore three building society cases, the *Ambition Investment Co.'s* case (3), *Barnard v. Tomson* (4), and *Counties Conservative* case (1), in which it has been held that the crucial date is the date of the winding up of the society.

In re Sunderland 36th Universal Building Society (2) was a decision on the particular rules of the society, and it would be a strong thing to extend it to a society where the rules were not in the same terms.

In *Barnard v. Tomson* (4) it was held by North J. that members who had given notice to withdraw, and whose notices had matured before the date of the deed of dissolution, were, notwithstanding the winding up, entitled to be paid in priority according to the dates of their notices.

(1) [1900] 2 Ch. 819.
(2) 24 Q. B. D. 394.

(3) [1896] 1 Ch. 89.
(4) [1894] 1 Ch. 374.

[LORD HANWORTH M.R. That case is an illustration of the principle laid down in the *Ambition Investment Society's* case (1) and in *Walton v. Edge*. (2)]

It is here submitted that the appellants' notice of withdrawal having matured before the dissolution of the Society the liquidator is not entitled to say that it has been affected by circumstances showing insolvency between the date of the notice and the date of the dissolution.

There are marked distinctions between the provisions as to winding up in the Industrial and Provident Societies Act, 1893, and those in the Building Societies Act, 1874, whereas those of the Companies Act, 1929, are practically the same as those in the Industrial and Provident Societies Act, 1893.

[They referred to Industrial and Provident Societies Act, 1893, ss. 4, 10, 22, 23, 58, 60; Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 13, 14, 16; Building Societies Act, 1894 (57 & 58 Vict. c. 47), s. 1; Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 123; Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 157.]

F. R. Evershed, for a holder of withdrawable shares who had given notice of withdrawal expiring before the winding up but after the notice of the meeting to wind up, adopted the same argument.

C. E. E. Jenkins K.C. and *H. Wynn Parry* for shareholders who had given notice of withdrawal before the meeting, but which did not expire until after the resolution to wind up.

For the present purposes there is no distinction to be drawn between friendly, industrial and building societies. The question here is one that cannot arise in the case of a company established under the Companies Acts.

Building and other societies contemplate something in the nature of a partnership between the members, and it can never have been intended that one member should be able to withdraw from a society to the prejudice of the other members who remain in it. It is admitted that there is no reported authority on the point which is binding on this Court.

(1) [1896] 1 Ch. 89.

(2) 10 App. Cas. 33, 36.

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The substantial question here is one of law—namely, whether there is a date anterior to the date of the winding up at which it can be said that the rights of members crystallized.

Reliance has been placed by the appellants on s. 60 of the Industrial and Provident Societies Act, 1893, which deals with the liability of members in a winding up. By cl. (e) of that section it is provided that “An individual, society, or company shall be taken to have ceased to be a member, in respect of any withdrawable share withdrawn, from the date of the notice or application for withdrawal.” It is submitted, however, that the section has no application to the present case. It is dealing only with the liability of the members, *inter se*, in the case of a winding up. Clause (e) applies to the determination of the question which members should be on the A list and which members should be on the B list. The clause was not intended to alter the actual rights existing at the date of the winding up.

It was contended that the material date was the date of the notice of withdrawal and not the date when it expired. But if that were so the result would be that no shareholder could ever be put on the A list of contributories but might be put on the B list.

In re Blackburn and District Benefit Building Society (1) (affirmed by the House of Lords sub nom. *Walton v. Edge* (2)) is distinguishable on the facts and does not apply to the present case. It was pointed out by Lord Selborne in the House of Lords (2) that the question the House had to consider was “what right accrued to the withdrawing member who gave notice not only before there was any winding-up, but when he had no information that any winding-up was going to take place, when nothing special is alleged to affect him with notice that the society was not to continue as a going concern?”

The contention that the rules laid down in the authorities with reference to building societies do not apply to industrial and provident societies cannot, it is submitted, be sustained.

These societies are wholly different from companies, in that in the case of the latter the shareholders cannot get back the money paid by them for their shares.

In *Brownlie v. Russell* (1), which was a building society case, Lord Selborne expressed the opinion that the rules contemplated a going concern, and that the winding up put an end to the option given by them to the shareholder to withdraw his shares.

Carrick v. North British Building Society (2) was the first authority in which it was held that the rule laid down in *Brownlie v. Russell* (3) could be applied to a case where before the winding up it was shown that the society was no longer a going concern.

In re Sunderland 36th Universal Building Society (4) was the first English case in which the question in the present case arose. There the facts were practically identical with those in this case, and it was held by the Divisional Court that the rule in that case provided only for withdrawal from the society while it was or was believed to be solvent, and that, therefore, notices of withdrawal which were given or which matured at a time when the society was known to be insolvent, though before the actual date of the winding-up order, did not entitle the shareholders who had given them to be paid the amount of their subscriptions in priority to other shareholders in the winding up. That case is indistinguishable from the present, and should, it is submitted, be followed by this Court.

In *Sixth West Kent Mutual Building Society v. Shove* (5) the *Sunderland* case (4) was considered and followed by Stirling J.

In *In re Ambition Investment Building Society* (6) it was held by Vaughan Williams J. that the line was to be drawn at the time when there was a stoppage of the society's business, or a recognition, by those who were entitled to form a judgment, that the business must be stopped. That

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(1) 8 App. Cas. 235, 254.

(4) 24 Q. B. D. 394.

(2) 22 S. L. R. 833.

(5) [1899] 2 Ch. 64*n*.

(3) 8 App. Cas. 235.

(6) [1896] 1 Ch. 89.

C. A. decision was much relied on and was followed by Maugham J.
1931 in the present case.
UNITED *Wilfrid Hunt* for the liquidator.
CITIZENS *Macaskie K.C.* replied.
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Cur. adv. vult.

Nov. 30. The following written judgments were delivered.

LORD HANWORTH M.R. This is an appeal from an order made by Maugham J. on July 14, 1931, upon a summons taken out in the above matter whereby he determined that notices of withdrawal which had been given in respect of withdrawable shares in the Society and had not expired at the date of the notice and circular of April 8, 1930, hereinafter more particularly referred to, were not effectual.

It is unnecessary to repeat in detail the facts which are explicitly and fully stated in the judgment of Maugham J.

The appellants are the United Women's Homes Association, Ltd., who were holders of 69,000 withdrawable shares in the capital of the United Citizens Investment Trust, Ltd. (hereinafter referred to as "the Society"), a company registered in the year 1927 under the Industrial and Provident Societies Act, 1893. In consequence of the difficulties in which the Society found itself, a report upon its general condition and the possibility of reconstruction was prepared for the consideration of its directors by Sir W. H. Peat early in the year 1930. That report showed that without reconstruction it was not possible for the Society to carry on its business; and at the same time it was found that, for reasons both legal and practical, it would not be possible for such a scheme to be carried out.

On March 18, 1930, the report of Sir W. H. Peat was carefully considered by the board of directors of the Society, and it was resolved "that in the opinion of the directors the interests of shareholders could best be served by winding up the Trust and that the necessary arrangements be made to put such recommendations before the shareholders without delay."

On April 8 a notice was sent out calling an extraordinary general meeting of the Society to be held on April 30 for the purpose of considering resolutions to wind up the Society voluntarily. That notice was accompanied by a circular which informed the members that the true position of the Society was such "that it would be unfair to shareholders in general to continue the Trust on its present basis."

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The alternative of reconstruction was demonstrated to be impracticable, and the conclusion was indicated that the only wise course was to pass the resolutions for winding up contained in the notice calling the meeting.

The meeting was held on April 30, and the resolutions to wind up voluntarily and appointing Sir W. H. Peat were duly passed.

Now the Association had given notice to the Society of withdrawal of 30,000 shares on October 18, 1929, and a later notice of withdrawal of 32,000 shares.

By the rules of the Society such a notice matured at the expiration of six months from the date on which it was given. It will thus be seen that the first notice as to the withdrawal of 30,000 shares matured on April 18, 1930—that is, between the date of the circular and the passing of the resolution to wind up. The second notice did not expire till after the resolution for winding up had been passed.

Maugham J. decided that the notices of withdrawal, which had been given in respect of the withdrawable shares, and which had not expired at the date of the notice and circular of April 8, were not effectual. The appellants appeal from that decision to this Court. They claim that as the notice of the withdrawal of the 30,000 shares matured before the resolution to wind up, it should be treated as effective. They have not appealed from his decision as to the 32,000 shares.

Maugham J. held the notice which matured on April 18 ineffective, because before that date it was recognized that a stoppage of the business of the Society was inevitable. He held that the notice could not run its course towards the goal of maturity after recognition that the Society was no longer a going concern in the sense that it was still in a

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position to carry out the objects for which it had been formed : it was not necessary to wait for the date at which the legal machinery to wind up the Society was put into operation. He thus decided that all notices which matured after the date of the notice of April 8, 1930, were inoperative. There is authority in support of this view to be found in two cases upon which Maugham J. relied.

The first, *In re Ambition Investment Building Society* (1), where Vaughan Williams J. holds that the stoppage of business or anything equivalent to it—not the insolvency of the society—is what sterilizes the notice to withdraw. Insolvency is difficult to determine, especially in a business that is able to carry on its purpose ; but when the stoppage has become inevitable, that fact must make itself plain to all.

It must be remembered that what is involved in the matter now before us is the question of the rights of the members, inter se, whose mutual rights are regulated by the rules. It seems unfair that one member should be able to secure an advantage in priority to his fellow members when there has supervened a recognition that the business in which the members are all of them engaged cannot be continued and must be brought to an end. This case of *In re Ambition Investment Building Society* (1) appears to cover the point now before us, but its authority and relevance are questioned by the appellants. Vaughan Williams J., in coming to his decision, relied upon the cases referred to in his judgment, and in particular upon *Carrick v. North British Building Society*. (2)

In the latter case Lord Shand had said in his judgment, referring to *Tennent v. City of Glasgow Bank* (3), that the principle to which effect was given in that case was that the rules, applicable only to a going business, could no longer receive effect when it had become apparent to the directors of the society that, from its losses, the business of the society could no longer be carried on. His words were (4) : “ The

(1) [1896] 1 Ch. 89.

(2) 22 S. L. R. 833.

(3) (1879) 6 R. (H. L.) 69.

(4) 22 S. L. R. 833, 840.

rules applicable only to a going business could no longer receive effect, and it seems clearly to follow that the liability of the parties to share the losses must be fixed as at that time, and could not be affected by notices of withdrawal which were only suitable to a going business, and had become quite unsuitable after every member had of necessity been compelled to withdraw."

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I desire to agree with the observations made by Maugham J. as to the judgment of Stirling J. in the second case, *In re Counties Conservative Permanent Benefit Building Society*. (1) It is clear that the learned judge there intended to fix as crucial the date of the notice on June 26, 1895, issued for the purpose of summoning a special general meeting to consider on July 10 the advisability of dissolving the society. I have sent for and read the affidavits which were before the learned judge. The assets were stated to be only 3665*l.*, and in a paragraph of the affidavit of the trustee, appointed for the purpose of the dissolution, it is stated that 151 members had given notices of withdrawal which had matured before June 26, 1895, for sums which totalled 8809*l.* These figures justified the statement that the whole funds of the society would be exhausted by the notices given before the date of the resolution for winding up, but also before the date of the notice calling the meeting, and Stirling J. clearly adhered in his order to the latter date as fixing the rights of those members, in priority to those whose notices matured later.

Mr. Macaskie argued that, as under the rules members can withdraw at any time, a member by giving notice secures priority over his fellow-members who do not give a notice, if the notice in fact is given on a date antecedent to the winding up. And secondly, that the test as to whether the notice is effectual is to be found by an inquiry whether the giver of the notice, at the time he gave it, had any information that the company was going to be wound up.

Two cases are cited in support of these propositions: *In re Blackburn and District Benefit Building Society* (2)

(1) [1900] 2 Ch. 819, 825.

(2) 24 Ch. D. 421.

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and *Walton v. Edge*. (1) The former of these cases does not appear to me to govern the present case. The point that was decided was that in the winding up members who had given notices which had matured before the winding up were entitled in priority as against those members who had not given notice of withdrawal; but those rights of the members, *inter se*, were postponed to the rights of outside creditors. The members who had given effective notices of withdrawal were not to be treated as outside creditors, but as still being members. It is clear, from the question propounded by Brett M.R. (2) and Bowen L.J. (3), that the above is the question determined, and not any question whether a notice, which remained current when the business of the society could not be carried on, enured to stabilize the rights of a member who had given it. This decision of the Court of Appeal was affirmed under the name of *Walton v. Edge*. (1) Lord Selborne (4) definitely says that the House was considering the rights of a withdrawing member, "who gave notice not only before there was any winding up, but when he had no information that any winding up was going to take place, when nothing special is alleged to affect him with notice that the society was not to continue as a going concern."

In 1890 the point was again considered in *In re Sunderland 36th Universal Building Society* (5), and the judgment of Lord Shand, already quoted, was taken as the guide to the Court in determining during what length of time the option of withdrawal was available to members of a building society. Mathew J., in delivering the judgment of the Court, said that it is not the order to wind up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case puts an end to the right to withdraw. It was, therefore, definitely decided that the notice given by one, Oliver, was ineffective. The relevant dates were—notice given on October 8, 1886, maturing on

(1) 10 App. Cas. 33.

(3) 24 Ch. D. 436.

(2) 24 Ch. D. 421, 428.

(4) 10 App. Cas. 33, 36.

(5) 24 Q. B. D. 394.

April 8, 1887. The impossibility of continuance of the society's work was revealed on February 17, 1887, and thereafter no new members were admitted, no new shares taken out, no money was borrowed, no money was advanced to any members on mortgage, nor was any withdrawing member repaid. On June 17, 1887, resolutions were passed for voluntary winding up.

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Careful consideration of these cases confirms the opinion that Maugham J. has applied the right test and reached the right conclusion. There is not found in them any justification for the test suggested, that the knowledge of the giver of the notice decides whether his notice was good or not. Such a test seems opposed to the basic principles which underlie the structure of a mutual society.

It is argued, however, that these cases relate to building societies and that industrial and provident societies, of which the Citizens Investment Trust is one, are not governed by the same or analogous rules; in particular, because of the terms of s. 60 of the Industrial and Provident Societies Act, 1893, which provides that, in winding up, the liability of members and the adjustment of the rights of contributors amongst themselves shall be qualified as follows: "(e) An individual, society, or company shall be taken to have ceased to be a member, in respect of any withdrawable share withdrawn, from the date of the notice or application for withdrawal."

Examination of this s. 60, as a whole, shows that it has no bearing upon the question before us. It purports to deal with the liability of members in winding up. It provides—cl. (a)—that no one who has ceased to be a member for one year or upwards prior to the commencement of the winding up, shall be liable to contribute, and it adds consequential provisions.

The clause above cited does not alter the general principle laid down in the above cases. It determines the date at which the cessation of membership is to be calculated for the purpose of the other limbs of the section, and the lapse of the one year specified in cl. (a). It contains the important

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word "withdrawn"—which connotes effective withdrawal and the right to repayment. It may be argued that it means actual repayment; though my present view is that the right to repayment on withdrawal, whether actually carried into effect or not, is sufficient. It is not necessary now to decide between these two views. It is sufficient to say that cl. (e) does not make the date of the notice of the application to withdraw the crucial date in the case of industrial and provident societies for all purposes.

If s. 60 then does not make this suggested difference, the analogy of the building societies' cases seems complete. No doubt the rules applicable to individual societies must be considered and adhered to, but those in the present case do not provide any distinction from the principle laid down by Lord Shand in *Carrick v. North British Building Society* (1), and in the *Sunderland* (2) and other cases referred to, and applied in them in accordance with the rules respectively applicable to the members of the societies according to the dates and facts relevant to their withdrawals.

For these reasons, in addition to those stated by Maugham J., in my judgment the appeal fails, and must be dismissed with costs.

LAWRENCE L.J. In my opinion Maugham J. was right in holding that the principle laid down in the relevant building societies' cases is applicable to the present case, and I agree with him in the conclusion which he has reached based on that principle.

Mr. Macaskie and Mr. Christie contended before us that there was an essential difference between the constitution and activities of building societies and provident societies, and that the principle referred to ought therefore not to be applied to the latter. No doubt in many respects these societies differ essentially from one another, but they have this in common, that shareholders are permitted to withdraw their shares, and in this respect they both differ fundamentally from companies incorporated under the Companies

(1) 22 S. L. R. 833.

(2) 24 Q. B. D. 394.

Acts. So far as regards this common attribute, however, I see no reason why a different principle should be applied to the construction of the rules concerning the withdrawable shares of a building society and to the construction of similar rules of a provident society.

The most formidable objection to the application of the principle laid down in the building society cases to the ascertainment of the rights of withdrawing shareholders in the winding up of a provident society is based on the provision contained in cl. (e) of s. 60 of the Industrial and Provident Societies Act, 1893, which provides that "An individual, society, or company shall be taken to have ceased to be a member, in respect of any withdrawable share withdrawn, from the date of the notice or application for withdrawal." No similar provision is to be found in the statutes regulating the affairs of building societies, and at first sight this provision, when divorced from its context, would seem to be capable of the construction that a member of a provident society who had given a valid notice of withdrawal at any time before the commencement of the winding up had, as from the date of the notice, ceased to be a member and become a creditor. In my opinion, however, this is not the true effect of the provision in question. Sect. 60, in which it is contained, is concerned with the qualification of the liability of present and past members to contribute to the assets of the society in a winding up. The section, which is obviously taken from s. 38 of the Companies Act, 1862 (now replaced by s. 157 of the Companies Act, 1929), serves as a guide to the liquidator in settling the A and B lists of contributories in the winding up, but does not purport to alter the contractual rights of the shareholders *inter se*. Holders of fully paid up shares, whether present or past, are not under any liability to contribute to the assets for any of the purposes mentioned in the section, and consequently the section has no application to the appellants, whose shares were all fully paid up. In my opinion, it is plain that cl. (e) was enacted for the purpose of enabling the liquidator to ascertain whether a holder of partly paid up

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C. A. shares who had given an effectual notice of withdrawal, and
 1931 in pursuance of that notice has "withdrawn" his shares
 UNITED before the winding up, ought to be placed on the B list or
 CITIZENS not, and for no other purpose. The expression "withdrawn"
 INVESTMENT in that clause, in my opinion, means "repaid" or at most
 TRUST, LD., in that clause, in my opinion, means "repaid" or at most
In re. "whose notice of withdrawal has matured." Further, it is
 LAWRENCE L.J. to be noted that under rule 16 of the Society's rules a
 member only ceases to be a member when his shares have
 been repaid. This rule, in my opinion, does not conflict with
 or contradict but explains rule 3, sub-rule 2, from which some
 words are obviously omitted.

The only other contention of the appellants to which I need refer is that the cases upon which the learned judge has based his judgment are not binding on this Court and were wrongly decided. The last of those cases, the *Ambition* case (1), was decided over thirty-five years ago, and has never been questioned. It must have been acted upon in the winding up of many building societies. Even if I thought it had been wrongly decided, which I do not, I am of opinion that it would not be right to overrule it.

The principle clearly laid down by the relevant cases is that rules as to the withdrawal of shares, such as exist in the present case, contemplate a going concern, and although mere insolvency or information on the part of the shareholder of the likelihood of stoppage is not sufficient to stop their operation, yet they cease to be operative when there is either an actual stoppage of the business or anything equivalent to it, or a recognition of the fact that a stoppage is inevitable. The *Sunderland* case (2) clearly shows that the principle applies not only where a member has given notice of withdrawal after a stoppage of the business, or after the recognition of the inevitability of such a stoppage, but also where a member has given notice before either of these events but whose notice has not 'matured' when either of these events has happened. In the *Sunderland* case (2) Oliver had given a notice of withdrawal on October 8, 1886, maturing on April 8, 1887; on February 17, 1887, the society was

(1) [1896] 1 Ch. 89.

(2) 24 Q. B. D. 394.

known to be insolvent; and although a winding-up order was not made until July 2, 1887, it was held by the Divisional Court that Oliver was not entitled to priority, but must rank with other members of the society. The facts in that case are indistinguishable from the facts in the present case. Here the appellants gave their notice of withdrawal on October 18, 1929, maturing on April 18, 1930. On April 8, 1930, the notice and circular of that date were sent to all the members. It was hardly disputed, and cannot be denied, that this notice and circular contained a clear intimation to every shareholder that a stoppage of the Society's business was inevitable, and that the only practical course to adopt was to wind up the Society. The learned judge, in his judgment, alluded to the apparent discrepancy between the date mentioned in the judgment of Stirling J. in *Counties Conservative* case (1), and in the order as drawn up. From the affidavits in that case, which we have inspected, it is plain that nothing turned on the difference between June 26, 1895, the date of the notice convening the meeting to consider the advisability of dissolving the society, and August 8, 1895, the date of the winding-up resolutions. Under the rules, members who had given notice of withdrawal were entitled to payment according to the priority of the receipt of the notice by the society. The amount due to members whose notices had matured before June 26, 1895, was far more than sufficient to exhaust the whole of the available fund, and therefore it was immaterial to consider the rights of members whose notices had matured between that date and August 8, 1895, and no argument was addressed to the Court on this subject. The main question debated and decided in that case was as to the effect of the resolution of March 23, 1893, putting in force rule 68. It is plain that the learned judge did not intend to express any dissent from the principles laid down in the *Sunderland* (2) and *Ambition* (3) cases, which were not mentioned by him nor cited by counsel.

In the result, for the reasons stated, I agree that this appeal fails and should be dismissed with costs.

(1) [1900] 2 Ch. 819.

(2) 24 Q. B. D. 394.

(3) [1896] 1 Ch. 89.

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ROMER L.J. The question to be determined on this appeal is whether by reason of the notice of withdrawal given by the United Women's Homes Association, Ltd., which expired before the commencement of the voluntary winding up, but which had not expired at the date of the notice and circular of April 5, 1930, the Association has obtained a right to receive back the sum paid upon the shares comprised in the notice in priority to shareholders who had either given no notice of withdrawal or whose notices expired after the commencement of the winding up.

Questions of a like nature have often arisen in cases of building societies, and the law applicable to those cases is not, in my opinion, open at the present time to dispute or doubt.

The first case to which reference need be made is that of *Brownlie v. Russell* (1), not indeed because the question decided there resembles the question that has to be decided on this appeal, but because of the observations made by Lord Selborne and Lord Watson as to the effect of a winding up upon the right of withdrawal. Lord Selborne said (2): "It takes away the option which otherwise, if the concern had been a going one, would have belonged to each member—it, by a *vis major*, . . . puts a close to the whole concern—it terminates, at that date, the account of each shareholder." Lord Watson said (3): "I think, with your Lordship, that from the moment when the decree of liquidation was pronounced he became disabled from taking advantage of rule 12 and withdrawing himself from the society." These observations clearly indicate that if a winding up takes place before a member has become entitled under the rules as to withdrawal to receive back from the society the money paid by him in respect of his shares, the option of withdrawal has come to an end, and since that date I am not aware that any one has ever contended the contrary. But these observations did not cover the case of the member who has given a notice of withdrawal expiring before the beginning

(1) 8 App. Cas. 235.

(2) 8 App. Cas. 254.

(3) 8 App. Cas. 257.

of the winding up, but who has not at that time been actually paid by reason of the right of withdrawal under the rules being qualified by the words "provided the funds permit." Such a case came before the Court of Appeal in *In re Blackburn and District Benefit Building Society* (1), and that Court decided that the member's right to be paid out of available funds in the winding up had not been defeated. The case is not relevant to the decision of the present one except for this circumstance. When the case came before the House of Lords (2) the appellant's counsel observed that, if the respondent's contention was sound, the moment a building society was suspected to be in difficulties, there would be a rush of members to give notice and secure priority. It was no doubt with reference to this argument that Lord Selborne, in moving that the appeal should be dismissed, said (3): "The question is, what right accrued to the withdrawing member who gave notice not only before there was any winding-up, but when he had no information that any winding-up was going to take place, when nothing special is alleged to affect him with notice that the society was not to continue as a going concern." To the warning so given by Lord Selborne to persons seeking to withdraw from a building society on the eve of liquidation, practical effect was given by a Divisional Court in *In re Sunderland 36th Universal Building Society*. (4) In that case it was held that two members, whose notice of withdrawal was given at a time when the society was known to be insolvent, were not entitled to be repaid their subscriptions. But it was further held that a member whose notice was given before, but expired after, that time was equally debarred from being repaid. In delivering the judgment of the Court, Mathew J., after reading the rule as to withdrawal, said (5): "We are of opinion that this rule was not intended to apply where the society was no longer able to carry on its business, and where it had become notorious that the society could not meet its liabilities. It

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(1) 24 Ch. D. 421.

(2) Sub nom. *Walton v. Edge*,
10 App. Cas. 33.

(3) 10 App. Cas. 36.

(4) 24 Q. B. D. 394.

(5) *Ibid.* 403.

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would be altogether unreasonable to suppose that it was intended in the event of insolvency to permit one set of members to escape from liability at the expense of the others. There would seem to be no adequate consideration or motive for such an arrangement. The rule seems to us not to contemplate any such contingency as a suspension of its business, and, therefore, only to provide for a withdrawal from the society while it was, or was believed to be, still solvent. There was sufficient evidence to shew that before the times at which two of the notices were given, and the third became effective, the members, and all others who were interested, knew that the societies were no longer in a condition to carry out the objects for which they had been formed, or to fulfil their undertakings with their members. That the societies could not go on is shewn from the scheme of reconstruction laid before the members, which practically involved the liquidation of the affairs of each of the societies. In this state of things the right to withdraw, it appears to us, no longer exists." Then, after stating that the view which they took was in accordance with the judgment of Lord Shand in *Carrick v. North British Building Society* (1), he added: "It is not the order to wind up, but the state of things which to the knowledge of all concerned renders liquidation inevitable, that in such a case as this puts an end to the right to withdraw."

In *Barnard v. Tomson* (2) North J. treated that decision as laying down the principle to be applied to the case before him, though, on the facts, he decided in favour of the withdrawing member. It was also followed by Stirling J. in *Sixth West Kent Mutual Building Society v. Shove*. (3)

These authorities, or some of them, were considered by Vaughan Williams J. in *In re Ambition Investment Building Society* (4), and he summed up the effect of them as follows: "The relations of these persons"—i.e., the shareholders—"must be borne in mind. They have in common put their capital into an adventure or concern which it was hoped

(1) 22 S. L. R. 833.

(2) [1894] 1 Ch. 374.

(3) [1899] 2 Ch. 64*n*.

(4) [1896] 1 Ch. 89, 99.

would yield a profit. There is a proviso enabling capital to be withdrawn. How long is the right to withdraw capital to continue? It must continue as long as the adventure continues or its continuance is contemplated; but as soon as the adventure comes to an end, or the adventurers or their officers recognise that it must come to an end, from that moment every principle of justice requires that all who have joined in the common adventure shall in common bear the loss." The learned judge then added: "and from that time the rule as to withdrawal ceases to operate, and there ought to be no applications for withdrawal." It is clear, however, reading his judgment as a whole, that in his view not only would the right to give notice of withdrawal cease in the event contemplated, but that, in the case of a notice already given, but not then matured, the right to be repaid would also come to an end.

In view of these authorities, which have never been questioned, it must, in my opinion, be taken as settled law that in the case of a building society, unless the rules clearly indicate a contrary intention, the power of withdrawing shares is determined so soon as the society or its officers recognize that the business of the society can no longer be carried on. I entirely agree with Maugham J. when he says that the effectiveness of notices of withdrawal must not be judged by considerations personal to a particular holder of shares. When the time arrives at which the society or its officers recognize that the stoppage of its business is inevitable, no member who has failed to give a notice of withdrawal that has already matured is entitled to withdraw his subscriptions, whatever may be the state of his own knowledge in relation to the affairs of the society. It is, however, said that this principle is only applicable to building societies and not to societies formed under the Industrial and Provident Societies Act, 1893. That the authorities to which I have referred were all concerned with building societies is true, but the principle is founded upon grounds that are in no way concerned with the particular kind of business that the society may be carrying on. The

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C. A. principle applies to all societies whose rules provide for members withdrawing their shares, and is based upon the presumed intention of persons embarking upon a common adventure, whatever the precise nature of that adventure may be.

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Reliance was placed by the appellants upon s. 60 (e) of the Industrial and Provident Societies Act, 1893, as excluding such societies from the application of the principle. It was contended that, by virtue of that section, a member who has given a notice of withdrawal that is valid at the time it is given, ceases thereupon to be a member, whatever may be the position of the society at the date of its maturity. I am unable to take this view. The provision in question is only applicable to a share that is "withdrawn," and that, in my opinion, means a share which a member has under the rules obtained an indefeasible right to have repaid. If before the date of maturity of the notice of withdrawal a state of affairs has arisen that would prevent the shareholder obtaining such a right by reason of the principle to which I have referred, the share cannot be treated as "withdrawn" within the meaning of the section. The section is indeed merely dealing with the liabilities in a winding up of the past and present holders of partly paid shares, and the object of cl. (e) is to ensure that, if the holder of such a share has given an effective notice of withdrawal more than twelve months before the liquidation, he is not to be placed upon the B list of contributories, even though his notice should mature within that time.

It only remains to apply the principle of law in question to the facts of the present case, for there is nothing whatever in the rules that indicates any intention of the members of this Society that so equitable a principle should be excluded. Applying that principle, the claim of the appellants must fail. For although the notice of April 8 in terms necessarily left it to the members to decide whether there should or should not be a winding up, it is in my judgment quite plain from the accompanying circular that in truth there was no option in the matter, and that as from

the issue of that circular the Society recognized, as assuredly did its directors, that a winding up was inevitable.

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

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Solicitors for appellants: *Sole, Sawbridge & Co.*

Solicitors for liquidator: *Linklaters & Paines.*

Solicitors for other parties: *Bower, Cotton & Bower; Allen & Overy; Maples, Teesdale & Co.; Johnson, Jecks, & Colclough.*

W. I. C.

RUSSIAN AND ENGLISH BANK v. BARING BROTHERS AND COMPANY, LIMITED.

EVE J.

[1921. R. 806.]

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Banker—Foreign Law—Russian Bank—London Branch—Action brought in Name of London Branch—Dissolution of Bank by Decree of Soviet Government—Procedure Summons—Stay of Action—Plaintiffs non-existent—Power to wind up Branch as an unregistered Company—Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 338, sub-s. 2.

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A bank incorporated in Russia in 1911, with British shareholders holding a majority of the shares, established a branch in London under separate management in 1915. In 1917 the Bolshevik revolution took place, and the bank ceased to carry on any business in Russia, its last general meeting being held at Petrograd in June, 1917. In 1921 an action was commenced in the name of the bank by British shareholders to recover two sums of 100,000*l.* and 80,000*l.* forming part of a credit lodged by the former Russian Government with the defendants, an English bank, and alleged to have been assigned to the plaintiffs. Pleadings were delivered but the action lay dormant for several years, after which pleadings were amended and the Attorney-General was added as a defendant. At some uncertain date, either before or shortly after the action was launched, the plaintiffs were dissolved and ceased to exist as a corporation at Russian law by virtue of a decree of the Soviet Government:—

Held, on a procedure summons taken out by the defendants, that the action must be stayed indefinitely, as the plaintiffs no longer existed either in Russia or in Great Britain.

Dictum of Lord Finlay in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* [1925] A. C. 112, at p. 141, dissented from.

Semble. Although extinguished in the country of its origin, there is power in the Court to wind up the English branch of a foreign corporation as an unregistered company under s. 338 of the Companies Act, 1929.

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The plaintiffs claimed a declaration that they were the assignees of two sums of 80,000*l.* and 100,000*l.* forming part of an account held by the defendants, known as the *Compte Speciale* of the former Russian Government, with interest at the rate of 6 per cent. from November, 1917, and also, so far as might be necessary, administration of the *Compte Speciale* and an order on the defendants for payment.

The plaintiffs were a banking corporation incorporated under Russian law in 1911, with their head office at Petrograd. The London branch was established under separate management in 1915. The moneys claimed represented an appropriation made in October, 1917, by the then Russian Ministry of Agriculture for the purchase of seeds from a Danish firm. A cable was sent by the Russian Ministry to the defendants instructing them to pay the sum of 180,000*l.* to the plaintiffs' London branch, but they refused to make the payment, on the ground that they could not do so without the authority of the agent in London of the Russian Treasury, and that no such authority was given to the defendants. The defendants did not admit that there had ever been any appropriation or sale or assignment of any of the funds standing to the credit of the *Compte Speciale*. They also pleaded that these funds were insufficient to meet the claims of the plaintiffs and all other persons upon them, and that they were willing to assist the Court in determining who was entitled to the funds.

The Attorney-General, by his defence, pleaded that the *Compte Speciale* of the Chancellerie de Credit of the Russian Government was a credit kept by moneys provided by the Bank of England against the deposit at the bank to the order of H.M. Treasury of Russian Treasury bills discounted by the Bank of England. The approval of H.M. Treasury was required for payment, and the Treasury did not approve of the payments alleged by the statement of claim to have been requested by the Russian Government or a department thereof. The Attorney-General claimed all rights and interests

in the *Compte Speciale* on behalf of His Majesty, and submitted the same to the judgment of the Court.

The action was commenced in the name of the London branch of the plaintiffs, and pleadings were delivered in 1921, but all proceedings therein were suspended until 1929, when the pleadings were amended.

The defendants took out this summons in June, 1931, asking that the action be stayed on the ground that the plaintiffs were no longer an existing person, having been dissolved and extinguished since the action was commenced by a decree of the Soviet Government in Russia.

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Gavin Simonds K.C. and *Laurence Tillard* for the defendants. There was never any authority for commencing the action in the name of the plaintiffs, but apart from that it cannot now survive, as the plaintiffs as a corporation are no longer in existence, having been abolished by Russian law. The Court of Appeal has recently given a decision which covers the present case, having discharged a garnishee order based on a judgment obtained against another Russian bank which had ceased to exist: *Lazard Bros. & Co., Ltd. v. Midland Bank, Ltd.* (1) The action ought now to be stayed. The defendants do not claim any costs incurred since this summons was taken out in June last.

Rayner Goddard K.C. and *Sir Albion Richardson K.C.* for the plaintiffs. The plaintiffs have no doubt been abolished as a corporation in Russia, but the branch survives in London with English shareholders, who claim a beneficial interest in these moneys. The Soviet legislation has no extra-territorial effect. The plaintiff corporation was alive when the action was begun. A company, like an individual, may be domiciled in two different countries.

The main authority on which the plaintiffs rely is contained in two passages in Lord Finlay's speech in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (2), where he said that, even if it had been established that the

(1) (1932) 101 L. J. (K. B.) 65. shortly).

To be reported in the Law Reports (2) [1925] A. C. 112, 137, 141.

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Russian company in that case had ceased to exist in Russia, he would not treat that finding as decisive of the case, and expressed the opinion that the London branch was still in existence and could sue for the purpose of getting in its assets. The Soviet decree, whatever its effect in Russia, has no effect at all outside its own country. And see per Lord Wrenbury in the same case. (1) The shareholders in England are an association of natural persons who can use the name of the company in an action. *In re Matheson Brothers, Ltd.* (2) decided that the Court had jurisdiction under the Companies Act, 1862, to wind up a company registered in New Zealand, but having a branch office in England. But the contrary view was taken by Pearson J. in *In re Lloyd Generale Italiano* (3), where the foreign company was represented by agents in England. In *Rey v. Lecouturier* (4) the plaintiffs were the representatives of a foreign religious Order, the Carthusian monks, who had been dissolved by French law, but they succeeded in establishing as against the liquidator of the Order their title to the English trade marks registered for Chartreuse liqueur: see, especially, the judgment of Buckley L.J. The Legislature must be taken to have adopted his view that a company might be dead in the country of its origin, but alive here: Companies Act, 1929, s. 338. The fact that the London branch of the company had a separate existence in England distinguishes the present from *Lazard Bros. & Co., Ltd. v. Midland Bank, Ltd.* (5). The writ in this action was issued before there was any recognition of the Soviet Government in Russia by His Majesty's Government. The date of that event was April 20, 1921, when a communication was made by the Government to the Court of Appeal (*Aksionairnoye Obschestvo A. M. Luther v. Sagor & Co.* (6)), stating that the Soviet Government was recognized. The present application comes too late. We are prepared, if necessary, to join English shareholders in the company as parties to the action.

(1) [1925] A. C. 149.

(2) (1884) 27 Ch. D. 225.

(3) (1885) 29 Ch. D. 219.

(4) [1908] 2 Ch. 715.

(5) 101 L. J. (K. B.) 65.

(6) [1921] 3 K. B. 532.

Gavin Simonds K.C. in reply. This case must be dealt with on the footing that there has been no winding-up order. The money is alleged to be the property of a Russian corporation which no longer exists according to Russian law. It cannot be alive in Great Britain for any purpose: *Banque Internationale de Commerce de Petrograd v. Goukassow* (1), per *Atkin L.J.* Where an action is brought by a corporation, it must prove that it is a valid corporation according to the law of the country which created it, and the precise name under which it sues is unimportant: *Henriques v. Dutch West India Co.* (2); *National Bank of St. Charles v. De Bernales.* (3) The incorporators cannot step into the shoes of a corporation if it is dead. The rule that the majority binds has no application to an unincorporated body. There is no statement in *Rey v. Lecouturier* (4) that the Carthusian monks were a corporation created by French law; if incorporated at all they were so by Papal decree. The dictum of Lord Finlay in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (5) is not supported by any authority and, we submit, is erroneous.

Stafford Crossman for the Attorney-General. The Attorney-General supports this application, but will not add anything to the argument. His view is that the plaintiffs' title must be strictly proved.

Cur. adv. vult.

1932. Jan. 12. *EVE J.* This action has been pending since March 23, 1921. It was brought to recover two sums of 100,000*l.* and 80,000*l.*, alleged to be moneys of the plaintiff bank in the hands of Baring Brothers & Co., *Ld.*, with interest at 6 per cent. per annum from October 31 and November 5, 1917, respectively. The pleadings were closed in April, 1929, and on June 18, 1931, the defendants, Baring Brothers & Co., *Ld.*, issued the summons with which I have to deal, whereby they seek an order that all further proceedings in

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(1) [1923] 2 K. B. 682, 693.

(3) (1825) 1 C. & P. 569.

(2) (1728) 2 *Ld. Raym.* 1532.

(4) [1908] 2 Ch. 715.

(5) [1925] A. C. 112.

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the action may be stayed on the ground that the same was commenced without the authority of the plaintiff bank, and that the solicitors by whom the writ was issued and who are joined as respondents to the summons may be ordered to pay to the defendants their costs of the action down to and including the summons and any order made thereon.

The plaintiff bank was incorporated under Russian law in April, 1911, and in November, 1915, established a branch in London whereat an ordinary banking business was being carried on when in November, 1917, the Bolshevik revolution broke out. At that date the Bank's capital was 15,000,000 roubles, divided into 60,000 shares of 250 roubles each whereof, according to the evidence, some 45,000 were held by or in trust for British subjects domiciled in this country; but the documents of title relating to all but a few thousands of these shares were in the possession of the bank in Russia. The last general meeting of shareholders was held in Petrograd in June, 1917, and at some subsequent date—possibly after the institution of this action, but certainly some considerable time before the issue of this summons—the plaintiff bank was dissolved or otherwise ceased to exist as a company under or by virtue of the laws of Russia, the country in which it was incorporated.

The question is whether on the happening of that event, which may well be likened to the laying of the axe at the root of the tree, the corporators interested in the administration of the assets pertaining to the English branch of the bank, or any survivors of those to whom the bank had committed the supervision or management of the affairs of the English branch, could continue to use the name of the bank as plaintiffs in an action for the recovery of moneys alleged to form part of such assets.

But for a passage in Lord Finlay's speech, in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (1), I should have thought that the question was incapable of any but a negative answer. In that case,

(1) [1925] A. C. 112.

as in *Goukassow's* case, which immediately follows in the reports, the House of Lords were considering and determining the question whether the respondents, upon the construction of the decrees of the Soviet Government there put in evidence, had proved that the Russian bank was in fact dissolved, and, having come to the conclusion that the respondents had not established their plea, it became unnecessary to decide what would have been the position had the question of construction been otherwise decided. But Lord Finlay did add at the conclusion of his speech this paragraph. (1) He says: "It must never be forgotten that here we have to deal with a branch of the bank established and carrying on business in this country. Even if it had been demonstrated that the Russian bank had, so far as Russia was concerned, ceased to exist, I should not treat that as decisive in this case. The London branch has existed for a long time, it has carried on business here, there are many English shareholders, liabilities to British subjects have come into existence. It carries on business here now just as the French branch does in Paris. To affirm the defence set up by the defendants in the present case would be to make it impossible for the branch to get in its assets and discharge its liabilities. In all fairness the branch must have the right to use the name of the bank for the purpose of getting in its assets. If there is any other body or person having a preferential right to these securities a claim may be made in the winding up in this country. But it is clear that the Comptoir d'Escompte de Mulhouse, having been paid the 1,090,000 marks, has no right to retain the securities too; the securities should be returned to the London branch by which they were lodged and which is suing in this action for their recovery, having paid off the debt."

I cannot find that statement or any similar one in any of the other speeches, and I do not think there is any authority to support it. Lord Sumner, who read Lord Finlay's speech, did not express any endorsement of it, but entirely agreed with the Lord Chancellor's opinion, in which

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there was no mention of this sort made. Lord Wrenbury, after stating that, had he thought the Soviet decrees effective to extinguish and determine altogether the existence of the Russian Corporation, there would have emerged another question upon which he should have desired to hear argument, then went on to suggest that, notwithstanding the death of the foreign corporation, there might possibly survive an association or partnership of natural persons whose relations inter se are to be found in the articles of association of the company, and are to be ascertained no doubt with reference to the *lex loci contractus* continuing for the purpose of winding up the company's affairs so far as this country had control over the persons and the assets within its jurisdiction. I venture to think these suggestions would hardly have been necessary had he shared Lord Finlay's view that an action to recover assets could be established and maintained in the name of the defunct foreign corporation.

I have dealt with this at length, because Lord Finlay's observations are directly in point in this case, where we have a defunct Russian Corporation for some years prior to and at the date of its decease carrying on by means of authorized agents an important branch in this country, with many English shareholders, large assets and considerable liabilities. In such circumstances the extinction of the Russian Corporation no doubt gives rise to a serious question as to what is proper to be done to collect and protect the assets of the branch, to discharge its liabilities and to distribute any surplus which may remain after the creditors have been satisfied.

But, with all deference to Lord Finlay's opinion, I do not think those difficulties are to be solved in the manner he indicated without disregarding some important principles. In *primis*, what is the effect of the dissolution and destruction by the law of Russia of an incorporated body the existence of which depends on the law of the same country? That question appears to me to have been completely answered by Scrutton L.J. in his judgment in *Banque Internationale*

de Commerce de Petrograd v. Goukassow (1), where he says: "So in the case of artificial persons, the existence of such a person depends on the law of the country under whose law it is incorporated, recognized in other countries by international comity, though its incorporation is not in accordance with their law. If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person. I cannot conceive a company, whose existence and attributes arise solely from the law of Russia, continuing to exist when the law of Russia says it is dissolved. With what body and attributes does it survive, and what law constitutes it? It does not comply with the requisites of English companies and is dissolved by the law of Russia." And then a little later, on the same page, he adds: "But the English Courts do know and recognize a law which has destroyed it, and in my opinion must apply their own *lex fori* to determine what person can or cannot sue in their Courts. In my opinion therefore English Courts are bound to treat this plaintiff bank as dissolved and incapable of suit in English Courts." To the same effect is what Atkin L.J. says (2): "We are considering whether the alleged actor exists, and in determining that issue, it appears to me that the Court must apply its own law, the *lex fori*. Whether the plaintiff in an English Court is alive or dead would be determined on an issue of fact by English evidence and procedure. . . . In the case of an artificial person, such as a foreign corporation, our law would look to the law of the country which created the corporation, and finding the corporation dissolved by that law, our Court must also treat the corporation as dissolved."

What, then, results from these conclusions? That a defunct corporation seeking to maintain an action is, as Bankes L.J. describes it (3), "in the eye of our law no party at all but a mere name only, with no legal existence." A non-existent person cannot sue, and when I have the admission that the

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(2) [1923] 2 K. B. 693.

(3) [1923] 2 K. B. 688.

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plaintiff bank has long since ceased to exist in Russia, I should be disregarding the emphatic opinions expressed by all the members of the Court of Appeal as to the result brought about thereby were I to allow this action to be further prosecuted. When once the Court is made aware that the plaintiff is non-existent, and therefore quite incapable of maintaining the action, it is bound to put an end to it.

I appreciate, as have all who have had to deal with similar applications, that this judgment may involve questions as to the ownership of property belonging to the defunct corporation. Bankes L.J., in the *Mulhouse* case, expressed the opinion that it did not appear to him at all necessary to decide what was the exact legal position of the persons carrying on the business of the branches after the parent bank had been abolished (1); and in the same case Atkin L.J. pointed out that the result of holding that the parent bank was in fact dissolved was to make it impossible for the branch to enforce any of its rights or liabilities, and to leave in considerable peril all those who in the course of banking business in the City of London had in any way at any time after the dissolution taken any part in disposing of or handling its assets, "for," he added, "obviously a non-existent person can give no title to anything." (2)

But I cannot help thinking that these difficulties can be mitigated, and the acts of those who have intermeddled with the affairs and assets of the branch, after the destruction of the parent company, be regularized by adoption and ratification by a liquidator in a winding up constituted under s. 338 of Part X. of the Companies Act, 1929. Sub-s. 2 of that section would appear to fit the circumstances. It enacts that "where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under Part X. of the Act notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

(1) [1923] 2 K. B. 630, 647.

(2) [1923] 2 K. B. 663.

In view of the question whether there are or can be any continuing members of a dissolved company, the petition, I assume, would have to be presented by a creditor.

At the Bar the defendants limited their claim to recover their costs from the solicitors who issued the writ to the costs of this summons, but, having regard to the difficulties involved in ascertaining the effect of the Soviet legislation, and to the length of time the defendants allowed to elapse before making this application, I think justice will be satisfied if I make an order to stay the action.

The costs of all parties of the action down to and including this order to be taxed and paid out of the fund in question as between solicitor and client.

Solicitors for plaintiffs: *Guedalla, Jacobson & Spyer*.

Solicitors for defendants: *Bischoff, Coxe, Bischoff & Thompson*.

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Foreshore—Sea Wall—Construction under Statutory Powers—Land between Wall and Tidal Estuary—Foreland left for Protection of Island—Title to Land—Compensation for Land “taken or left out”—“Vesting” of Wall and Works in Commissioners for Purposes of Protection—Statutory Freehold Title—Riparian Owner—32 Geo. 3, c. 31, ss. x., xi., xii., xviii., xiv., xvi.—Canvey Island (Sea Defences) Act, 1883 (46 & 47 Vict. c. lxxiii.), ss. 1, 6, 26, 27, 30, 31, 34, 48.

By an Act of 1792 Commissioners were appointed and empowered to erect and maintain a sea wall or bank with a dyke and other works for protecting the shore of Canvey Island in Essex from inundation by the tides on the River Thames, and by s. xiii. of the Act it was to be lawful for the Commissioners if at any time they should think it expedient, to set back inland any walls, embankments or works, and leave out any land as a foreland for the protection of the residue, upon making reasonable satisfaction out of rates to be levied on the owners of protected lands, to persons whose land should be so taken or left out for such purpose.

In 1813 the Commissioners resolved to make a new inset or embankment further inland than an old wall which had fallen into disrepair, and proposed to leave a strip of about sixteen acres of land outside as a “foreland” between the river and the new embankment, and in 1814, D., the owner of this land, claimed compensation for the loss of the land, and an agreement was entered into between the parties for the payment to D. of 640*l.*, being at the rate of 40*l.* per acre. This sum was paid and the land occupied and the works carried out by the Commissioners, the wall being built on the inner edge of the land taken.

By the Canvey Island (Sea Defences) Act, 1883, the defendants were incorporated as successors to the original Commissioners under the Act of 1792, with all the same powers, duties and liabilities, and also with the power, then conferred for the first time, of purchasing and holding land.

The plaintiffs, having purchased B. Farm on the south side of Canvey Island, which originally included the sixteen acres of land belonging to D. in 1814, granted a lease of the farm to a company which proposed to use it for the purpose of an oil storage depot with a wharf abutting on the river. The defendants objected to the proposed user of the land and claimed to be entitled to all the land between the wall and high-water mark, including the site of the wall. The plaintiffs brought this action against the Commissioners and their lessees, the Canvey Island Urban District Council, claiming that they had a good title to the soil

of the land underlying the sea wall and extending between the wall and the river:—

Held, by Eve J. (following his own decision in *Canvey Island Commissioners v. Preedy* [1922] 1 Ch. 179), that the effect of the agreement between the former Commissioners and D. in 1814 and of s. xiii. of the Act of 1792 taken together was to vest the fee simple of the whole of the land taken in the Commissioners, as on a sale by D. and purchase by them for 640*l.*, and therefore the plaintiffs had no title to it and their action failed.

On the appeal the question was limited to the site of the wall.

Held, by the Court of Appeal (reversing the decision of Eve J.), that the Commissioners in 1814 had no power to purchase land, and only acquired such an interest in the land in question as to enable them to construct the sea wall and other defensive works against inundation, and to prosecute or defend any action in respect thereof or of any trespass or damage thereto. They did not acquire the fee simple therein, which remained vested in D. and passed on the devolution of the title of B. Farm to the plaintiffs on their purchase of the property. The sum of 640*l.* was paid to D. not as purchase money, but as compensation for the abandonment and loss of the land under and beyond the sea wall.

Held, also, that the plaintiffs were riparian owners, with a right of access to the Thames, notwithstanding the existence of the Commissioners' wall, which did not sever the land from the river, and that they had not lost that right by non-exercise of it.

Held, therefore, that the plaintiffs were entitled to a declaration that they had a good title to the land in question, subject to such right or property to or in the embankment, etc., constructed thereon as was vested in the Commissioners under the joint operation of s. x. of the Act of 1792 and s. 27 of the Act of 1883, and to a further declaration that they were entitled to erect on the strip of land such works as they might require which did not injure the embankment, etc., or interfere with the access of the Commissioners thereto for the purposes of inspection and maintenance.

Observations as to an incorrect recital of the effect of a statute contained in the preamble of a later statute.

Canvey Island Commissioners v. Preedy [1922] 1 Ch. 179 in part overruled.

WITNESS ACTION.

The plaintiffs claimed a declaration that they had a good title to the soil of a strip of land consisting of some sixteen acres on the south shore of Canvey Island, Essex, fronting on the Thames estuary. The first defendants, the Canvey Island Commissioners, denied the plaintiffs' claim and pleaded that the land in question was vested in them under a statutory title. The second defendants, the Canvey Island Urban District Council, claimed as lessees of the first defendants.

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C. A. The facts were stated by Eve J. in his judgment as follows :—

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The subject-matter of this action is a comparatively narrow strip of land on the southern boundary of the Island of Canvey in Essex forming in part the site of a ditch, road and embankment made and erected along its northern edge to prevent encroachment by the sea, and in other part a foreland on the seaward side of the embankment.

The Island has been subject to inundations by the sea from time immemorial. Early in the seventeenth century, when the area of the Island was some 4000 acres, one-third of the lands were given in fee simple to one Joas Croppenburgh, a Dutchman, in consideration of his sufficiently winning and recovering the Island, and these lands (known as the Third Acre lands) are still chargeable for the repair of the sea defences. Private owners also have erected sea defences, and thereby from time to time recovered land from the sea. These lands are called the Outsands. The remaining lands are known as the free lands. The strip in dispute is part of the free lands.

At a distance varying up to 300 feet from the present embankment, and running in a more or less parallel line with it and constituting the southern boundary of the strip in dispute, are the remains of Croppenburgh's embankment or wall.

Towards the end of the eighteenth century Croppenburgh's defences, including the wall I have just mentioned, had fallen into serious disrepair, and the rents and profits of the Third Acre lands were no longer adequate for the maintenance thereof. The area of the Island had then already been reduced to a little over 3000 acres, and, according to the preamble of the Act of Parliament to which I am about to refer, there was great reason to fear the whole Island would in a short time be totally lost.

Accordingly, by an Act passed in the thirty-second year of King George III. (1792) for more effectually embanking, draining and otherwise improving the Island, a body of twenty-four Commissioners was constituted, to whom was

committed the duty of building, raising, strengthening and maintaining walls and embankments and of executing drainage and other works necessary to preserve the Island from the sea.

In execution of the powers conferred upon them by the Act—to which I shall have to refer more specifically by and by—the Commissioners in 1814 acquired from one Colonel J. C. Dalbiac, the owner of a farm known as Brick or Brick House Farm, an interest—it will be observed I am using a neutral phrase—in the strip of land in dispute—some sixteen acres in extent—and proceeded to construct on and along the northern edge of it the present embankment and wall, a road and a ditch, leaving the rest of the strip as a foreland between the base of the new wall and the inside of Croppenburgh's old wall. The defendant Commissioners, the statutory successors under an Act passed in 1883 of the original Commissioners, claim that the interest acquired in the disputed area was the fee simple and accordingly that they are now owners in fee. Alternatively, they claim to have acquired a title by possession.

The plaintiffs, as the owners of Brick House Farm, deriving title from Colonel J. C. Dalbiac, allege that the interest and possession were and are of a qualified and conditional nature limited and measurable by the public purposes for which the Commission was established, and that subject to such possession, use or enjoyment as was necessary for these overriding purposes, the fee remained in Colonel Dalbiac, and is now vested in them.

Failing their being able to maintain this contention they plead that the land laid out as a foreland and the soil on which Croppenburgh's old wall was erected, by the gradual and imperceptible action of the River Thames had become foreshore before the year 1928, and now are part of the foreshore and bed of the Thames and their property.

It is, perhaps, hardly necessary to say that these two important public bodies are not litigating these questions for the sole purpose of having the ownership of a piece of land of very doubtful value determined.

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The decision involves the important question whether the owner of Brick House Farm ceased to have any access to the Thames before or at latest when he parted with the sixteen acres in 1814. If he did the plaintiffs cannot be in any better position as the present owner of the farm than he was after the transaction of 1814.

I address myself, therefore, and as far as possible in chronological order, to the facts and relevant documents relating to the transaction between the Commissioners and Colonel Dalbiac in 1814. By the Act of 1792 the Commissioners were empowered to raise the money required for the purposes of the Act by assessing and rating (inter alia) the several owners of the free lands at an annual acre rent or tax, the first annual rates or taxes to commence from May 1, 1792, and for the better ascertaining of the said rates or taxes an account in writing of the several lands in the Island signed by the several owners and proprietors and occupiers of the said lands or by the order of them respectively setting forth the exact number of acres of every parcel of said lands belonging to or occupied by them respectively and the respective yearly values or yearly rents thereof was to be made and delivered to the Commissioners.

Pursuant to an order of the Commissioners made on May 30, 1792, a survey and plan of the Island containing an account of the number of acres belonging to each owner, distinguishing the Free Land, the Third Acre lands and the Outsands, was made. A copy of this survey and plan was produced by the Commissioners bearing a memorandum to the effect that the Island was $13\frac{3}{4}$ miles in circumference, and a list of freeholds totalling 3034 acres, 3 roods and 30 perches, of which 776 acres, 3 roods and 17 perches were Third Acre farms. Amongst the holders of free lands is Colonel Dalbiac in respect of a farm containing 252 acres and 8 perches arable, and 15 acres, 1 rood and 35 perches, fleets and roads, making 268 acres, 2 roods and 3 perches in all. It is to be noted that on this plan, where at the entrance west of the Brick Farm land it approaches what was then left of Croppenburgh's wall, the boundary of the

farm land is not delineated as leading to the wall but stops short of it, a condition of things which is consistent with some later descriptions, and tends to show that the soil on which Croppenburgh's wall had been raised was not at that date regarded as forming any part of the Brick Farm land.

On June 16, 1813, the Commissioners resolved and ordered that another new inset, to contain in length about 160 rods from west to east from a certain place staked or marked out near the Sluice House in a direct line eastward abutting on the Scar House lands, was to be new made the ensuing season, and reasonable satisfaction made to the person or persons whose lands shall be so taken or left out for such purpose as directed by the Act of Parliament. This is the area in dispute. At their next meeting, held on May 11, 1814, the bargain with Colonel Dalbiac was struck and the proceedings are thus recorded: "It appearing at this meeting that the new inset intended to be made from the Sluice House in a direct line eastward abutting on the Scar House lands had been begun in pursuance of the order and resolution at the last meeting and was now proceeding And application being now made by James Charles Dalbiac, Esq., Lt. Col. 4th Dragoons, for a reasonable satisfaction for the loss of so much land belonging to the freehold estate of the said Colonel Dalbiac in the occupation of Mr. Daniel Nash which has lately been taken or left out for the purpose of a foreland or intended so to be for the better preservation of the Island and which is supposed to contain about sixteen acres And a reasonable compensation being demanded for the same It is resolved that such sum after the rate of 40*l.* an acre be allowed Colonel Dalbiac as a reasonable satisfaction for the loss of such land And the said Colonel Dalbiac being now present at this meeting doth agree to accept the said sum as the full consideration for the value thereof And the said Colonel Dalbiac having proposed to accept of such sum by payment of one half thereof the ensuing year and the other half part thereof the next year It is resolved and ordered that such sum

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be so paid accordingly after ascertaining the exact quantity of the land so lost."

At their meeting on May 10, 1815, the Commissioners resolved and ordered: "That the several parcels of land as well Third Acre lands as Free lands which have lately been set out as a foreland be admeasured by a proper judicious person to ascertain the quantities of land which have been taken from each farm and that such person be instructed to admeasure the same from the inside delf ditch of the present new wall to the inside delf ditch of the old wall, and that he do make a map of the same." This map cannot now be found, but nothing turns upon it. It is not unimportant to note that the land to be measured as taken out is to include the road and ditch on the landward side of the new wall, and is not to extend to any part of the old ditch and wall. This supports the conclusion suggested by the survey of 1792 that the old wall and ditch had already cut off the Brick Farm from access to the river.

The survey was made and produced at a meeting of the Commissioners held on May 13, 1818. It appeared therefrom that the area of Brick Farm set out as a foreland amounted to 16 acres, 0 roods, 4 perches, and it was resolved and ordered that the farms included in the survey should be assessed and charged in the then present and any future rates agreeable to the then present reduced quantities of the same after making a deduction therefrom of the quantities of land specified as set out as a foreland and taken respectively therefrom. In the meantime Colonel Dalbiac had been paid for the land in full, the entries in the Canvey Island ledger opened in 1792 and produced by the Commissioners being: "7th February 1816: By cash paid Col. Dalbiac in part of valuation on his land taken for a foreland 200*l.*"; "By the like on further account 137*l.* 15*s.* 0*d.*"; and January 30, 1817: "By cash paid Col. Dalbiac being the remainder of compensation due to him for land taken as a foreland 300*l.*" When the next rate was levied on the free lands he was assessed in respect of 237 acres instead

of 253, allowance being made for the 16 acres in accordance with the resolution I have just referred to.

It is convenient now to turn to the Act of 1792, and examine the provisions under which the foregoing position was reached. It is to be observed that the Commissioners are not incorporated, that they are authorized to cause an action to be brought and indictments or other prosecutions to be preferred in the name of their treasurer or clerk ; that whenever from any cause their number falls below twenty-four, successors are to be elected in manner therein mentioned ; that there is no express power given to them to hold land or to sell surplus land ; that they are not to be personally liable for any costs or charges, but that all costs and charges awarded against the Commissioners or any of them for anything done by them in the execution of their office are to be paid from and out of the moneys to be received by virtue of or under the Act. Provisions for making rules and orders, holding meetings, appointing officers and keeping accounts call for no comment, and I pass on to ss. x. and xi. By the first of these there are vested in the Commissioners "the several walls and banks, and the fleets, sluices and tunnels now erected, standing, or being in or upon the said Island (save and except such walls, banks and works as have been made by private persons since the first embankment of the said Island, to fence in and protect the said parts called The Outsands), and all walls, banks, fleets, drains, sluices, tunnels and works of drainage, which shall by virtue of this Act be made, erected or cut, in or upon the said Island, for the purpose of embanking, preserving and draining the same or any part thereof, and the right and property to and in the same, and the materials whereof the same do or shall consist." By s. xi. the Commissioners are required and directed "to support or build, raise, strengthen and maintain the said walls or banks, and other works of drainage, now standing and being in the said Island (except such as are erected and made as aforesaid, around the said parts called The Outsands), and to make and erect such other banks or walls, sluices and tunnels, and to cut such other drains, in, upon, through,

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and over the said Island, (except as aforesaid), as shall be necessary for the more effectually protecting, preserving, and draining of the said Island, making satisfaction for any damage occasioned thereby, the quantum whereof to be ascertained, in case the parties do not agree about the same, in like manner as is hereinafter directed with respect to the satisfaction or recompence to be made for any land that shall be taken or used for foreland by virtue of this Act; and all such walls, banks, drains, sluices, tunnels and other works shall from time to time be repaired, supported, maintained, worked, cleansed, and used in such manner as the said Commissioners shall direct and appoint." Sect. xii. empowers them to get materials out of and from any lands (not being a yard, garden, orchard, or avenue to a house) for the making, raising, strengthening, or repairing any walls, banks or other works in the like manner as had been used to be done before the passing of that Act. And then comes s. xiii., which I will read in full: "And be it further enacted, That if at any time hereafter it shall be thought expedient by the said Commissioners, that the said walls, embankments, or works, now made and erected, or hereafter to be made and erected, in, around, and upon the said Island, or any part thereof (except as aforesaid), should be set further inward into the said land, and that a larger part of the said Island should be set out for a foreland, for the preservation of the residue thereof, then and in such case it shall and may be lawful to and for the said Commissioners, or any person or persons thereto authorised by them, to set the said walls, embankments, or works (except as aforesaid) further inward, in and upon the said Island, for such distance, and in such manner, as they the said Commissioners shall think necessary for that purpose, without the let, hindrance, disturbance or interruption, of any person or persons whomsoever; and that in such case, the several other owners and proprietors of lands in the said Island (except as aforesaid) shall, upon the setting further in of the said walls, embankments, and works as aforesaid, contribute and bear respectively a rateable part and proportion towards and concerning the loss

of so much land as shall be so at any time left out for a foreland, unto the person or persons whose land shall be so taken or left out for such purpose; and the said Commissioners shall and are hereby required to make reasonable satisfaction to the person or persons whose land shall be so taken or left out for such purpose as aforesaid." And by ss. xiv. and xvi. the land so taken out for the purpose of adding to and enlarging such foreland of any owner who should not agree with the Commissioners concerning the value thereof, or by reason of infancy or other incapacity should be incapable of agreeing with them, was to be ascertained by a jury, and the money or recompense to be paid for any land taken or left out for a foreland belonging to any corporation or other incorporated persons was to be paid to such person or persons as such corporation or the guardians, trustees or committees should respectively nominate in trust with all convenient speed to be reinvested in the purchase of other lands to be conveyed and settled upon and subject to the like uses, trusts and limitations as the land so taken or left out as aforesaid belonging to such corporation or other incapacitated persons shall be then settled, limited or assured. And, finally, by s. xxxviii. it was enacted that the works then erected and made and vested in the Commissioners by the Act or thereafter to be made should not be subject to the survey, control, direction or order of any Commission of Sewers, or any law or statute relating to sewers, any law or statute to the contrary notwithstanding.

The devolution of the plaintiffs' title is set out in the judgment.

Sir Boyd Merriman K.C., Joshua Scholefield K.C., and Stuart Moore for the plaintiffs. The plaintiffs, who have purchased a considerable area of land on the south of the Island, claim to be entitled to the foreshore, including all the land between the old and the new walls, so as to give them access to the River Thames. The defendants' title only extends to the wall or embankment constructed in 1813 under the powers of the Act of 1792 (32 Geo. 3, c. 31), and

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the soil underneath that wall. In *Canvey Island Commissioners v. Preedy* (1) the Court held on the evidence that the defendants were entitled to the strip between the two walls. But that action was against a trespasser, and is not *res judicata* between the present parties. The first portion of the judgment holding that the plaintiffs, whether they owned the land or not, were entitled to an injunction against the removal of drift and shingle so as to expose their wall to greater risk from the sea is all that was necessary to decide that case. As to the second part, holding that the plaintiffs had a good title under the Act of 1792, we suggest that it should be reconsidered.

The right to erect and maintain a bank or wall to protect the land from floods should not be construed as cutting off the owners of land behind the wall from access to the river frontage, and so create an impassable barrier. In *Stracey v. Nelson* (2) the Court held that s. 47 of the Sewers Act, 1833, did not vest the property in sand-hills in the Commissioners of Sewers, though the hills were under their "view cognizance or management" in order to afford protection to the coast from the sea. The decision was followed in *Nesbitt v. Mablethorpe Urban District Council*. (3)

The defendants were reconstituted and incorporated by the Canvey Island (Sea Defences) Act, 1883, which vested the property of their predecessors in them and conferred upon them additional powers, including, what they had not before, power to purchase land.

Under the Public Health Act, 1875, s. 149, all streets within an urban district are to vest in and be under the control of the local authority. The effect of this and similar enactments is to transfer to the authority the surface and such rights in the soil below the surface as are essential to the maintenance, occupation, and exclusive possession of the street, but no more: per James L.J. in *Rolls v. Vestry of St. George the Martyr, Southwark*. (4) See also *Mayor, &c., of Tunbridge Wells v. Baird* (5) and Pratt and Mackenzie on

(1) [1922] 1 Ch. 179.

(3) [1918] 2 K. B. 1.

(2) (1844) 12 M. & W. 535.

(4) (1880) 14 Ch. D. 785, 796.

(5) [1896] A. C. 434, 442.

Highways, 17th ed., at p. 70. In the same way the defendant Commissioners own the wall and so much of the soil below as is necessary for its maintenance and exclusive possession.

[They also referred to *Coverdale v. Charlton* (1); *Duke of Newcastle v. Clark* (2); and *West Norfolk Farmers' Manure Co. v. Archdale*. (3)]

Gavin Simonds K.C. and *Wilfrid Hunt* for the defendants, the Canvey Island Commissioners. The Court examined into the title of the Commissioners in *Canvey Island Commissioners v. Preedy* (4) and came to the conclusion that it was made good. We do not suggest that the matter is *res judicata* here, but we submit that the decision was correct and should be followed. On the evidence there has not been, as the plaintiffs suggest, a gradual and imperceptible gain of the river on the land, but there was a sudden invasion about 1880.

The Court will strive against any interpretation of a statute which would deprive a man of his property without paying for it.

On the true construction of the Act of 1792 generally, and particularly of s. xiii., the land is vested for an equitable estate in fee in the defendant Commissioners without any conveyance: *Bruce v. Willis*. (5) The decision in *Stracey v. Nelson* (6) was only that the Commissioners of Sewers had jurisdiction over, not the property in, certain lands. As interpreted in *Nesbitt v. Mablethorpe Urban District Council* (7), that decision is not against the defendant Commissioners.

[They also referred to *Finchley Electric Light Co. v. Finchley Urban Council* (8) and *Mayor, &c., of Tunbridge Wells v. Baird*. (9)]

Roland Burrows for the defendants, the Canvey Island Urban District Council. I adopt the argument of counsel for the defendant Commissioners. The Council leases the foreshore, including part of the land in question from the Commissioners,

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(1) (1878) 4 Q. B. D. 104.

(2) (1818) 8 Taunt. 602.

(3) (1886) 16 Q. B. D. 754.

(4) [1922] 1 Ch. 179.

(5) (1840) 11 Ad. & El. 463.

(6) (1844) 12 M. & W. 535.

(7) [1918] 2 K. B. 1.

(8) [1903] 1 Ch. 437.

(9) [1896] A. C. 434.

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and objects to the use of the land for the oil storage depot proposed. Canvey Island has become a residential area, and the proposed user would ruin its amenities as a health and seaside resort. The Commissioners in 1814 were a corporation for the purposes for which it was created—namely, the defence of the island against the sea and river: *River Tone Conservators v. Ash*. (1)

Sir Boyd Merriman K.C. in reply. What was vested in the Commissioners under the Act of 1792 was not land, but the works constructed by them on the land, and the right of support for those works. If the Act meant that they were purchasing the land there would be no reason for vesting the materials of the old wall in the Commissioners.

[He referred to *Marshall v. Ulleswater Steam Navigation Co.* (2); *Bruce v. Willis* (3); *Lyon v. Fishmongers' Co.* (4); and *Milne Holme v. Allan*. (5)]

Cur. adv. vult.

July 21. EVE J. [stated the facts as above set out and, referring to the provisions of the Act of 1792, continued:] It will be gathered from the provisions of the Act to which I have referred that the whole system of defensive and drainage works then existing and thereafter to be executed under the statutory powers (except the walls, banks and works, fencing in and protecting the Outsands), and the right and property to and in the same and the materials thereof were to be vested in the Commissioners, and that satisfaction was to be made for any damage occasioned by the making and erecting of any banks or walls or the execution of any other works necessary for the more effectually protecting, preserving and maintaining the Island.

It is not necessary on this occasion to determine the nature or quantum of the interest of the Commissioners in so much of the defences of the Island as is dealt with in ss. x. and xi. of the Act. It may be that their interest therein is to be

(1) (1829) 10 B. & C. 349.

(4) (1876) 1 App. Cas. 662.

(2) (1871) L. R. 7 Q. B. 166.

(5) (1868) Sc. Rev. Rep. 6 C. S. (3rd

(3) 11 Ad. & El. 463.

Ser.) 328.

measured by the duties with which they were entrusted of maintaining the works so vested and of executing and maintaining such other works as should be necessary for the protection and drainage of the Island ; but on this somewhat difficult question I express no opinion. If and when it comes to be determined, regard will be had to the fact that this Act provides compensation for any damage occasioned by the exercise of the statutory powers, and that by a proviso at the end of s. 34 of the Canvey Island (Sea Defences) Act, 1883, the soil of all walls, banks or other works from time to time discontinued or abandoned by the Commissioners is to vest in and become the property (subject to any then existing rights of way) of the owners of the lands adjoining thereto in proportion to the frontage of their lands respectively adjoining the same.

The transaction with Colonel Dalbiac was entered into, and its effect falls to be determined under s. xiii. of the Act. By that section, as already has been stated, the Commissioners, should they at any time think it expedient that any part of the walls, embankments or works should be set further inward into the land and that a larger part of the Island should be set out for a foreland for the preservation of the residue thereof, are empowered to set the banks, walls or works further inward for such distance and in such manner as they shall think necessary for that purpose without the let, hindrance, disturbance or interruption of any person or persons, and upon the setting further in of the said walls, embankments and works the several other owners and proprietors of lands in the Island (except the owners of the Outsands) are to contribute and bear respectively a rateable part or portion towards and concerning the loss of so much land as shall be so at any time left out for a foreland unto the person or persons whose land shall be so taken or left out for such purpose ; and the Commissioners are thereby required to make reasonable satisfaction to the person or persons whose land shall be taken or left out for such purpose as aforesaid.

As I pointed out in my judgment in the former case, where I had to consider the construction of this section (*Canvey*

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Island Commissioners v. Preedy (1)), there can be no question but that the new wall and the banks and works connected therewith vested in the Commissioners by virtue of s. x. of the Act; but there are no express words in that section or elsewhere in the Act which can be pointed to as vesting in them the land set out or left out as an additional foreland.

On the other hand, if the whole estate did not pass to the Commissioners, it is difficult to see what continuing interest the owner could have in the land taken or set out after satisfaction had been made. The construction that the operation of s. xiii. was to confer on the Commissioners a statutory power to acquire land for an additional foreland is strengthened by ss. xiv. and xvi., the former of which provides that in case the person or persons whose land should be so taken out for the purpose of adding to and enlarging such foreland should not agree with the Commissioners concerning the value thereof, or by reason of infancy or otherwise should be incapacitated and incapable of agreeing with them, the Commissioners may have a jury summoned to inquire of, assess and ascertain such damage or recompense as they shall think fit to be awarded to such person or persons having right to such land as aforesaid. And the latter that the money or recompense to be paid for any land taken or left out belonging to any corporation or other incapacitated persons shall be paid to such person or persons as such corporation or the guardians, trustees or committees of such incapacitated persons shall respectively nominate for investment in the purchase of other lands to be settled on and subject to the like uses, trusts and limitations as the land so taken or left out should be then entitled, limited or assured. In these three sections (xiii., xiv. and xvi.) the expressions "reasonable satisfaction," "the value thereof," "damage and recompense," "recompense for the loss or damage sustained," and "money or recompense," are all used to describe the same subject-matter, that is, the monetary consideration payable to the owner for what is also variously described as "the loss of so much land,"

(1) [1922] 1 Ch. 179, 188.

“land taken or left out,” “the right to such land as aforesaid,” and “land so taken out or injured”; and I find a great difficulty in forming an intelligible conception of the sort of interest which could be left in the owner after he had received compensation for the loss of so much land, or the value of the land so taken or left out, or recompense for the loss or damage occasioned.

The plaintiffs argue that he could not have intended to deprive himself of his right of access to the river, but it is by no means clear that there was any such right subsisting at the time when the resolution was passed to move the defence wall inwards and to acquire the sixteen acres; and even if there was, the method by which the sixteen acres were ascertained and set out would seem to have put an end to such access; for it is established that the sixteen acres were ascertained by admeasuring the land from the inside delf ditch of the new wall to the inside delf ditch of the old wall (see minutes of May 10, 1818); from which it results that the whole new wall and the road and ditch on the landward side were erected and made on the sixteen acre area, and that the inside delf ditch of the old wall was accepted as the southern boundary of the area. Between this southern boundary and the river was the old wall, and this confirms what is suggested by the survey of 1792, that the Brick House Farm land had no frontage on the river but was in fact cut off from access thereto by the old wall and works. But, be this as it may, it is obvious that after the new wall and works were created and executed, the boundary of the farm lands was the landward edge of the new delf ditch; and in the absence of any evidence of a reservation by Colonel Dalbiac of his existing right of access to the river (if any) or of a grant to him of such right, it is scarcely possible to raise any presumption in his favour in reference thereto.

But there are some matters to which my attention has been directed by the plaintiffs with which I must deal. The root of their title is an indenture of November 30, 1839, whereby the trustees of a settlement executed by Colonel

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Dalbiac in 1836 with his concurrence conveyed Brick House Farm to Jonathan Wood, the tenant in occupation, describing it in the body of the deed as lying "on the south of the River Thames" and delineating it on the plan as still including the sixteen acres. In 1861 the trustees for sale under Jonathan Wood's will sold the property to one Asplin, again describing it as bounded on the south by the Thames. The plan shows the new wall and works as included in the property sold, but no other part of the sixteen acres. The next conveyance was one dated October 8, 1894, by Asplin's mortgagees to one Cole, and in that and subsequent deeds dated November 9, 1898, Cole to Kynochs, May 8, 1899, Kynochs to Kynochs' Estates, Ltd., and April 7, 1902, Kynochs' Estates, Ltd., to Kynochs, Ltd., the plans attached purported to show the site of the new wall and works as included in the property sold. In June, 1922, Kynochs, Ltd., conveyed to Sir John Bethell (purchasing for the plaintiffs), but did not include the site of the new wall and works; and on December 15, 1925, Sir John Bethell conveyed what he had purchased to the plaintiffs, who the day before the writ took a conveyance from Kynochs, Ltd., of the site of the new wall and works in consideration of a payment of 1*l.* and without any covenants as to title.

I do not think there is anything disclosed in these documents which assists the plaintiffs or prejudices the defendants. It is not suggested that any of these deeds or plans were shown to the defendants and they could not, of course, prevent the plaintiffs' predecessors from describing the metes and bounds of what they were purporting to sell in any terms they chose. So long as the defendants were left in undisturbed possession of that for which they had paid they were content. I think it is quite likely that Colonel Dalbiac never realized in 1836 and 1838 that he was dealing with the sixteen acres of land for which he had already been paid. I say this because the deeds are far from consistent in the statements of the acreage of the farm, and at the trial it was frankly admitted that an attempt to get out a reconciliation statement of the parcels had failed.

Of more significance was the prompt action with which the defendants insisted upon preventing any attempt to invade what they asserted to be their rights as owners of the sixteen acres. I am not dealing with action on their part referable to their obligations to maintain the defences and the drainage system, but to conduct justifiable only on the assumption that they were owners of the soil. I need not refer at length to the agreement with regard to the approach to the Kynoch Hotel, to the evidence of the two Admiralty slipways at the entrance (western end), or to the removal of the two notice boards erected by the plaintiffs themselves on different parts of the sixteen acres in 1925, but in 1922, when a firm of land agents and auctioneers were instructed to offer the farm for sale by auction with particulars which described it as having over 2300 feet of deep water frontage and being particularly adapted for dock purposes, the defendants at once gave notice to the auctioneers that the Commissioners claimed to be the owners of the foreshore lying between the existing wall and the line of the old breakwater, with the result that the auctioneer was instructed to make a statement at the auction modifying the particulars, and the auction proved abortive.

I have referred to those several matters because they were all more or less discussed at the trial, but I confess they do not seem to me to be of any material assistance in solving the question I have to decide, which is, after all, the construction of s. xiii. of the Act of 1792. Did the fee simple in the sixteen acres vest in the Commissioners under that section?

Before I answer that question I must refer to one other document and that is the Canvey Island (Sea Defences) Act, 1883 (46 & 47 Vict. c. lxxiii.). It is an Act for more effectually protecting from inundation by the sea and for otherwise improving the Island of Canvey and for other purposes. After stating shortly the condition of things antecedent to the Act of 1792 and the distinction between the Free Lands and the Outsands and the passing of the said Act, it recites (inter alia) with a marginal reference to ss. xii. to xvii. of

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the Act of 1792, that the Commissioners were thereby invested with powers of getting materials and acquiring lands in the Island for the purposes of the Act. Other recitals follow to the effect that the Commissioners had executed the Act of 1792 and had rated the Third Acre Lands and the Free Lands as therein mentioned, and that it was expedient that the Commission should be reconstituted and incorporated, and that the walls of the Island had been seriously damaged by storms and high tides in January, 1881, and it had become necessary to provide a large sum for their repair, and that it was reasonable and expedient and for the benefit of the whole Island that the distinction between the Outsands and the Free Lands should be abolished on condition of the Commissioners taking over and maintaining the works executed for the protection of the Outsands. Then by s. 1 the Lands Clauses Acts and the Commissioners Clauses Act are incorporated, and by s. 6, for the purposes of the execution of the powers and provisions of the Act of 1792 and of the now stating Act, a body of fifteen Commissioners was incorporated by the name of the Canvey Island Commissioners with power to acquire and hold lands for the purposes of their constitution. By ss. 26 and 27 the Commissioners appointed under the Act of 1792 were to cease to hold office on the passing of the Act of 1883, and all property, real and personal, vested in or belonging to them, and all powers, rights, duties, capacities, liabilities, exercisable by them under the Act of 1792 or otherwise were—subject to certain provisions of the Act of 1883 not material to be stated—transferred to and vested in the new Commissioners. By s. 30 the Outsands Works, so far as necessary for the protection of the Outsands or other parts of the Island were vested in them, and by s. 31 the duty was imposed upon them of maintaining, repairing and renewing all walls, banks and other works from time to time vested in them under either of the two Acts or otherwise, and by s. 48 a power of selling and disposing of surplus lands was conferred upon them.

The plan deposited for the purposes of the Act under ss. 4 and 5 was one upon which the Third Acre Lands, the Free

Lands and the Outsands are respectively coloured red, blue and green, and a reference thereto discloses the fact that the plaintiffs' land is shown as bounded by the new wall, and as not including any part of the soil on which the new wall and works are erected and made. The plan also shows that the new wall was the high water mark of ordinary tides.

What then is the conclusion to be drawn from the exhaustive examination which this trial has involved? That, although the interest of the Commissioners in the drains, sluices, tunnels, ditches and other works constituting the system by which the surplus water of the Island is kept in control and in the land used and occupied for such purposes may be limited and qualified by the purposes for which the land is so used and occupied, the same considerations do not apply to land acquired for full value under s. xiii. of the old Act, and I adhere to the opinion I expressed in *Preedy's* case (1) that the effect of the statute must have been to vest in the Commissioners the whole of the land acquired from Colonel Dalbiac and taken and set out pursuant to that section.

No evidence was forthcoming at the trial to establish the suggestion in the reply that the land in dispute by the gradual and imperceptible action of the water of the River Thames had become before 1928, and still is, part of the foreshore and bed of the river.

It only remains to add that when speaking of the defendants I have throughout been referring to the Commissioners for the time being. Their co-defendants, the Canvey Island Urban District Council, are lessees from the Commissioners of part of the land in dispute, and as such have been sued. The action will be dismissed against both defendants with costs.

H. L. L.

The Port of London Authority appealed. The appeal was heard on November 10, 11, 12, 13, 16 and 17, 1931.

During the opening of the appeal the appellants abandoned their appeal against the Canvey Island Urban District Council, and the appeal was accordingly dismissed.

(1) [1922] 1 Ch. 179.

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Sir Boyd Merriman K.C., J. Scholefield K.C. and Stuart Moore for the appellants. This is in effect an appeal from *Canvey Island Commissioners v. Preedy* (1), where it was held that the Commissioners had established their title under the Act of 1792 (32 Geo. 3, c. 31) and the Canvey Island (Sea Defences) Act, 1883, to the whole of the land taken and left out under s. xiii. of the Act of 1792. The question here really is what happened to the sixteen acres which the Commissioners took over from Colonel Dalbiac for the purpose of erecting a new wall on the edge of it and of leaving the rest of the strip as a foreland. Was it purchased or was the owner merely compensated for what was being done? The appellants are not, however, able to ask the Court for a decision in this appeal except as to the site of the wall. In *Canvey Island Commissioners v. Preedy* (1) Eve J. relied on the recitals in the Act of 1883 for the purpose of construing s. xiii. of the Act of 1792. An Act of Parliament does not, however, alter the law merely by expressing an erroneous view of its meaning: *Ormond Investment Co. v. Betts*. (2)

[LORD HANWORTH M.R. referred in confirmation of this to *Cape Brandy Syndicate v. Inland Revenue Commissioners*. (3)]

For the purpose of seeing what the Commissioners were doing, it is important to consider the position of an analogous body, the Commissioners of Sewers, in regard to works executed by them. At common law they had a title in their works as would enable them to sue for trespass: *Duke of Newcastle v. Clark*. (4) As a result of this decision the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), was passed, but that could not affect the common law position in 1792. That Act, after empowering the Commissioners in s. 19 to make and maintain new works, gives the power in s. 24 to contract for the purchase of land for the purpose of their works. Provision is made in s. 26 for the assessment of the purchase money by a jury in default of agreement, and by s. 38 on payment of the purchase money the Commissioners may enter on the land which shall vest in them. Sect. 39 provides for sale

(1) [1922] 1 Ch. 179.

(2) [1928] A. C. 143, 156.

(3) [1921] 2 K. B. 403, 414.

(4) 8 Taunt. 602, 620.

of surplus lands. Lastly s. 47 provides that "the property of and in all lands, tenements, hereditaments, buildings, erections, works, and other things which shall have been or shall hereinafter be purchased, obtained, erected, constructed, and made by or by the order of, or which are or shall be within or under the view, cognizance, or management of any commissioners of sewers . . . shall be and the same are hereby vested in the commissioners of sewers within or under whose view, cognizance, or management such lands, tenements, hereditaments, buildings, erections . . . and things shall respectively be" Wide as this provision is, the Court in *Stracey v. Nelson* (1) held that it did not operate to vest in the Commissioners the property in all things under their "view, cognizance or management," but only vested in them their own works and property. This decision was followed in *Nesbitt v. Mablethorpe Urban Council* (2); *Salisbury and Fordingbridge Drainage District Board v. Southern Tanning Co.* (1920), *Ld.* (3)

What then is the effect of the vesting provision in s. x. of the Act of 1792? In *Coverdale v. Charlton* (4) the question of the meaning of a vesting provision was considered in regard to the soil of a street under the Public Health Act, 1875, which by s. 149 provided that all streets should vest in or be under the control of the local board. There "vest" was not held to mean that the whole property in the land on which the street was vested in the local body, but only the surface of the street of such thickness as might be required for the purpose of doing those things necessary to the street or under it. In *Finchley Electric Light Co. v. Finchley Urban District Council* (5), where the site of a street which ultimately vested in the defendants as the urban authority under s. 149 of the Public Health Act, 1875, was originally conveyed to turnpike trustees in fee simple for the purpose of making a road under the Turnpike Road Acts, it was held that the property of the defendants in the site

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(1) 12 M. & W. 535.

(2) [1918] 2 K. B. 1.

(3) [1927] 2 K. B. 566, 580, 581.

(4) 4 Q. B. D. 104, 116, 118.

(5) [1903] 1 Ch. 437.

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of the street was not thereby enlarged, so as to entitle them to prevent electric wires being carried over the street at a height above the area required for the user of the street. See also *Rolls v. Vestry of St. George the Martyr, Southwark* (1); *Mayor, &c., of Tunbridge Wells v. Baird*. (2)

As regards s. xiii. of the Act of 1792 it submitted that even when the Act itself empowers a purchase, unless the purchase is necessary for the execution of the statutory powers, purchase will not be inferred: *Hollis v. Goldfinch* (3); *Greenwich Board of Works v. Maudslay* (4); *Conservators of River Lee Navigation v. Button*. (5) A fortiori, where, as in this case, there was no incorporation of the Commissioners and no express power to purchase and hold lands in mortmain conferred upon them by the Act of 1792, and at a time when (apart from express powers) Commissioners of Sewers had no property in their work, neither power to purchase nor actual purchase ought to be inferred. Further the appellants' predecessor in title was never "compensated for injurious affection" of his land by severance from the Thames.

As regards *Bruce v. Willis* (6), which will no doubt be cited against the appellants, there was a section in the Act in question which gave power to purchase and resell.

Lastly, it is submitted that the appellants have the usual rights of a riparian owner adjoining the Thames highway: *Marshall v. Ulleswater Steam Navigation Co.* (7)

Gavin Simonds K.C. and *Wilfrid Hunt* for the Canvey Island Commissioners. There is no evidence that the appellants have ever wanted this frontage to get to the river highway or that any frontager has ever used the frontage as an access to the highway. There is here a dyke which would have prevented such access. If it had been intended that there should be access to the highway it would have been provided for by statute. What the appellants really want is not access to the river, but to establish a petrol depot on

(1) 14 Ch. D. 785.

(2) [1896] A. C. 434, 437, 442.

(3) (1823) 1 B. & C. 205, 217.

(4) (1870) L. R. 5 Q. B. 397.

(5) (1881) 6 App. Cas. 685, 691.

(6) 11 Ad. & El. 463.

(7) L. R. 7 Q. B. 166.

their land and carry their petrol through pipes over the embankment to tank steamers in the river.

It is immaterial that the Commissioners were not originally incorporated. Under s. x. of the Act of 1792 they had a possessory title which would have enabled them to maintain an action for trespass and to do so in the name of their clerk. There is here no evidence of what the land was that was conveyed to the Commissioners. The clear intention of s. xiii. of the Act was that a person who had been paid in full for his land by the Commissioners should not retain any interest in it. The word *foreland* in the section is synonymous with *foreshore*.

[ROMER L.J. I suggest that the site of the wall was not dealt with by s. xiii. If that is so, you must rely on s. x.]

When land is bought and paid for it does not matter whether or not a wall is built upon it. It is clear that under s. xiii. that the Commissioners had power to build a wall on any part of the land taken by them. The minutes of June 16, 1813, and May 10, 1815, show, apart from any question of the power to do so, that the Commissioners were then acquiring the fee simple in the land on which the new wall was erected and the *foreland*. After the erection of the new wall the old proprietor ceased to be a frontager to the river highway. It is the existence of that barrier and not the claim to ownership of the soil that has cut off access to the river. "It is . . . necessary for the existence of a riparian right that the land should be in contact with the flow of the stream": *Lyon v. Fishmongers' Co.* (1) From the moment therefore that the barrier was interposed the landowner ceased to be a riparian owner. No weight, therefore, should be given to the contention that the Act of 1792 should be construed to prevent a loss of riparian rights. It is something unknown to the law that the wall should be vested in the Commissioners, as it clearly is under s. x. of the Act of 1792, and yet that rights in respect of it should be vested in another. There is in fact no evidence of any usage of the frontage in times past as an access to the river.

(1) 1 App. Cas. 662, 683.

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Apart from any express conveyance it is contended that the legal estate in the land passed under s. xiii. of the Act of 1792 upon purchase money being paid for it. The whole result of that statute is that when land is taken and the full price paid for it, the legal estate in fee simple vests in the Commissioners without conveyance. Alternatively under s. xiii. or s. x. of the Act, the whole fee simple in the soil on which the wall was built vested in the Commissioners. At the time the transaction went through it was never suggested that the landowner retained any interest in the site of the wall, and in the survey made in 1792 under the order of the Commissioners the measurements of property start from inside the ditch of the old wall, as they did in regard to the new wall in the survey made under the Act of 1883. Therefore from 1792 onwards all documentary evidence shows the old and new walls as not comprised in the land of Colonel Dalbiac or his successors. And there was no act of ownership or claim to access to the river until 1930.

It is with these considerations in view, that the Court should approach the construction of the Act of 1792. A point was made that the land could not have vested in fee simple in the Commissioners because at the material date they were not a corporation and no licence in mortmain was granted. In fact, however, the land was held under the power conferred by the Act itself, and the object of the last part of s. x. was only to enable the Commissioners' treasurer or clerk to sue on their behalf in his own name. Sect. x. vested in the Commissioners works to be done under ss. xi. and xii. Sect. xiii. gave the further power to set works back from the shore and leave a foreland on payment of compensation; and ss. xiv. and xv. provided for the valuation of the land taken in the absence of agreement, a fact which shows that the statute contemplated a purchase of the land taken. Sect. xviii. throws light on what is meant by s. x. by giving powers similar to those given to the Commissioners of Sewers in regard to certain outstands walls excluded from the vesting in the Commissioners, an exclusion which under s. 30 of the Act of 1883 ceased. It is worthy of notice too

that s. xxxi. of the Act of 1792 gives a power in regard to cattle damage feasant far beyond that existing at common law. Sect. 27 of the Act of 1883 is a statutory recognition that real property was vested in the Commissioners under the Act of 1792.

There is no authority for the proposition that where a man has had his property taken and paid for in full, as happened here under s. xiii. of the Act of 1792, he can yet retain a property in the land. In *Stracey v. Nelson* (1) what moved the Court to hold that property under the view and cognizance of the Commissioners of Sewers did not belong to them was that the property had not been paid for. Moreover, all that the Court did there was by a strained construction of s. 47 of the Sewers Act, 1833, to hold that the vesting provision did not apply. It was never suggested that if it had applied, it would not have vested the property in the Commissioners absolutely. Moreover, it is immaterial that there was no conveyance: see *Bruce v. Willis* (2), where under a statute containing a provision as to vesting similar to that in the present case, Coleridge J. held (3) that in the absence of any express conveyance "the facts amount to a statutable conveyance." A limited meaning is given to "vest" in such cases as *Coverdale v. Charlton* (4), but there again it was the inconvenience and injustice of giving the word its full natural meaning that influenced the Court. "Vest" is an appropriate word for passing everything. *Hollis v. Goldfinch* (5) has been relied upon, but the statute of 16 & 17 Car. 2 there being construed, which related to making navigable certain rivers, contained nothing denoting a purchase or that the soil was to become vested in the undertakers. *Duke of Newcastle v. Clark* (6) is also distinguishable, because the statute under construction was entirely different, whilst in *Conservators of River Lee Navigation v. Button* (7) the only question was as to the inference to be drawn in the absence of any evidence

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(1) 12 M. & W. 535.

(2) 11 Ad. & El. 463.

(3) Ibid. 483.

(4) 4 Q. B. D. 104.

(5) 1 B. & C. 205, 215.

(6) 8 Taunt. 602.

(7) 6 App. Cas. 685.

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of purchase. Here no such difficulty arises. So too *Mayor, &c., of Tunbridge Wells v. Baird* (1) and *Finchley Electric Light Co. v. Finchley Urban Council* (2) are distinguishable, for in each case the Act being construed was one conferring a right on a local authority without payment.

Again it is impossible to read the Act of 1883 without seeing that the Legislature thought the soil to be vested in the Commissioners. That is a matter of contemporanea expositio, and regard can be had to it to clear up an ambiguity in the earlier Act.

[They also referred to *Attorney-General v. De Keyser's Royal Hotel*. (3)]

Roland Burrows for the Canvey Island Urban District Council, against whom the appeal had been dismissed, took no part in the argument.

Sir Boyd Merriman K.C. in reply referred to *Bradford v. Mayor, &c., of Eastbourne* (4); *Northam Bridge and Roads Co. v. South Stoneham Rural District Council* (5); *Haedicke v. Friern Barnet Urban Council* (6); *Sampson v. Hoddinott*. (7)

Cur. adv. vult.

Dec. 16. The following written judgments were delivered:—

LORD HANWORTH M.R. This action was brought by the Port of London Authority by writ dated December 16, 1930, for a declaration “of their good title to the soil on which a dyke, cartway, and a wall or bank, for protecting the land of the plaintiffs in Canvey Island in the County of Essex, from the inroad of the River Thames, are situate.” That is the limited form of the declaration asked for in this Court.

The action was tried before Eve J., and occupied his attention on four days in June of this year, and he delivered his reserved judgment on July 21, when he dismissed the action against both defendants with costs. From that judgment the plaintiffs appeal to this Court.

(1) [1896] A. C. 434.

(2) [1903] 1 Ch. 437.

(3) [1920] A. C. 508, 527.

(4) [1896] 2 Q. B. 205.

(5) (1907) 23 Times L. R. 476.

(6) [1905] 1 K. B. 110.

(7) (1857) 1 C. B. (N. S.) 590, 611.

It is unnecessary to set out again the facts, for they are fully stated by Eve J. in his judgment.

The first defendants represent the Commissioners, originally appointed under the Act of 1792, and now an incorporated body under the Canvey (Sea Defences) Act of 1883. The second defendants are tenants to the Commissioners of the land between the embankment and the river. They were served with the notice of appeal and accordingly appeared upon it; but at the hearing before this Court, it was plain that the appellants could show no title to the land comprised in the lease to these defendants. Therefore, at an early stage, the appellants consented to the appeal being dismissed as against the second defendants with costs.

The plaintiffs derive their title from Colonel J. Charles Dalbiac, the owner of a farm known as Brick House Farm, who was the owner in possession of this farm in 1814, from which about sixteen acres were then taken by the Commissioners under the Act of 1792.

The full terms of the minute of May 11, 1814, are set out by Eve J., but as the exact terms of the transaction then carried into effect are important, I repeat the operative part: "It appearing at this meeting that the new inset intended to be made from the sluice house in a direct line eastward abutting on the Scar House lands had been begun in pursuance of the order and resolution at the last meeting and was now proceeding: and application being now made by James Charles Dalbiac, Lt. Col. 4th Dragoons, for a reasonable satisfaction for the loss of so much land belonging to the freehold estate of the said Col. Dalbiac in the occupation of Mr. Daniel Nash which has lately been taken, or left out, for the purpose of a foreland, or intended so to be, for the better preservation of the Island and which is supposed to contain about sixteen acres, and a reasonable compensation being demanded for the same; It was resolved that such sum after the rate of forty pounds an acre be allowed Col. Dalbiac as a reasonable satisfaction for the loss of such land."

Eve J. propounds the questions that have thus arisen between the parties. What is the true construction of

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s. xiii. of the Act of 1792 ? Did the fee simple in the sixteen acres for which reasonable satisfaction was paid to Colonel Dalbiac vest in the Commissioners under the section ?

An addition must be made to the facts stated by Eve J.—namely, that the plan and survey of the Island to which he refers, made pursuant to the order of the Commissioners on May 30, 1792, is described on its face, which we have looked at, as “a plan within the walls of Canvey Island.” Next it is to be noticed that the sum of 40*l.* per acre is expressed to be paid “as a reasonable satisfaction for the loss of such land”; and that, as Eve J. points out, no power is given to the Commissioners under the Act of 1792 to hold land, and there are no express words in s. x. or elsewhere in the Act which can be pointed to as vesting in the Commissioners the land set out or left out as an additional foreshore. There is nowhere any statement that the Commissioners sought to acquire or had acquired the fee simple of the land set out for the purpose of a foreland.

Although it is not unnatural to seek it, I agree with Eve J. that it is not possible to find any assistance towards the solution of the problem in the subsequent devolution of Colonel Dalbiac’s estate or the maps attached thereto. Nor do I think that the Act of 1883 affords any assistance.

That Act certainly does not provide any parliamentary interpretation of the earlier Act under the canon laid down in *Ormond Investment Co. v. Betts*. (1) The recital (ii) to it, that “the Commissioners were invested with powers of getting materials and acquiring lands in the Island for the purposes of the Act,” and ss. xxvii. and xxxiv. seem of general import and utility, and do not clear up the meaning and effect of a particular transaction.

I turn, therefore, to the Act of 1792.

The Commissioners were not incorporated, and if they were to cause an action to be brought, or to order and direct an indictment to be preferred, it was important that the inconvenience of joining all the Commissioners in the suit in the one case, or in laying the property in all of them in the other,

(1) [1928] A. C. 143, 156.

should be obviated ; and so it was by the terms of s. x. Such a provision is not uncommon in Acts passed for similar or analogous purposes at that period of our judicial procedure ; for if the joint owners had not been all joined in the action, or all correctly named in the indictment, the proceedings would have been bad.

By the Act for improving the Administration of Criminal Justice in England, 1826 (7 Geo. 4, c. 64), s. 15, it is provided that property of a county in bridges, courts, gaols, infirmaries, asylums, and the like may be laid in an indictment as belonging to the inhabitants of such county. By s. 16, property of parishes or for the use of the poor in a parish may be laid in the overseers of the poor, and materials for the highways in the surveyor of highways. Sect. 17 similarly provides as to the property of turnpike trustees. Sect. 18 deals with property under the Commissioners of Sewers, as to which it is thereafter sufficient to state any such property belonging to the Commissioners of Sewers without specifying their names.

The purpose, therefore, of s. x. is, in my opinion, to vest the walls, banks, etc.—except those that had been made by private persons to protect the “outsands”—for the purpose of facilitating procedure. The words of the section are : “and all walls, banks, fleets, drains, sluices, tunnels and works of drainage which shall by virtue of this Act be made, erected or cut in or upon the said Island for the purpose of embanking, preserving and draining the same and the right and property to and in the same shall be and are hereby vested in the Commissioners for the time being, and they may cause an action to be brought in the name of their treasurer or clerk or to order and direct the preferring of indictments and no such action shall abate by the death or removal of the treasurer or clerk.” The section is very awkwardly drawn ; but its purpose, whether fully effected as to indictments or not, does not appear to me to be in doubt. It is procedural.

But even if the “vesting” is held to be of the same nature as the vesting of streets, under s. 149 of the Public Health

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Act, 1875, such a vesting does not connote a complete transfer of the freehold; it does not vest the subsoil. The vesting of the street is for "the purpose of maintaining it as a street for the purpose of such things as are usually done in a street, for the purpose of maintaining it as a street, and which are incident to the maintenance and repair of the street as a street": see *Mayor, &c., of Tunbridge Wells v. Baird* (1); and street means the surface and so much of the depth as may be not unfairly used as streets are used; see *Coverdale v. Charlton* (2); and see *Bradford v. Mayor, &c., of Eastbourne*. (3)

Thus the property of an urban district council does not extend upwards to an altitude beyond what is necessary for the user of the streets: *Finchley Electric Light Co. v. Finchley Urban Council*. (4) The full rights in fee over the streets are not vested in the local authority: see per Romer L.J. (5) And this vesting lasts only so long as the highways are highways: *Rolls v. Vestry of St. George the Martyr, Southwark* (6); and for the purpose of a highway: see per James L.J. (7)

Different considerations apply where land is taken compulsorily under powers given by the Lands Clauses Act or where land is purchased for a public undertaking: *Northam Bridge and Roads Co. v. South Stoneham Rural District Council* (8), where there was an express power to contract for, and purchase the land taken.

Passing from s. x., s. xi. required the Commissioners to maintain the walls, or banks, "and other works of drainage now standing and being in the said Island . . . and to make and erect such other banks or walls, etc., as shall be necessary for the more effectively protecting preserving and draining the said Island making satisfaction for any damage occasioned thereby." The quantum of that satisfaction is to be ascertained in the same manner as the satisfaction or recompense for any land taken or used for foreland is ascertained in ss. xiv. and xv.

(1) [1896] A. C. 434, 439.

(2) 4 Q. B. D. 104, 121, 126.

(3) [1896] 2 Q. B. 205, 211.

(4) [1903] 1 Ch. 437.

(5) [1903] 1 Ch. 443.

(6) 14 Ch. D. 785.

(7) *Ibid.* 797.

(8) 23 Times L. R. 476.

Sect. xii. gives power to the Commissioners to get materials for the walls, banks or other works "in like manner as hath been used to be done before the passing of this Act." The section makes no provision for compensation or recompense to be paid to any one for these materials taken.

At this point, therefore, the Commissioners have got power: (1.) to maintain the old banks, walls and other defences of the Island; (2.) to make and erect and cut other banks, walls and defences and drains as may be necessary for the protection of the Island; and (3.) to take all materials necessary thereto; and they are only required to make "satisfaction" for any damage occasioned by (2.). No power to purchase land or materials is given them.

Under s. xiii. a new and ancillary power is in my opinion given to them. For the protection of the Island it may not be sufficient to repair the old walls and banks, or to erect or cut others "in, upon, through and over the said Island." It may be good policy to set the line of the walls further inward, and set out a larger part of the existing land of the Island as a foreland for the preservation of the residue, thus leaving this foreland unprotected and open to the ravages of the sea. This they can do "without the let, hindrance, disturbance or interruption of any person or persons whomsoever." Again there is no provision for, or power to purchase—merely the right in their uncontrolled discretion to set the walls further inward and leave a portion of the then Island to its fate. The other owners and proprietors of lands in the Island are to "contribute and bear respectively a rateable part and proportion towards and concerning the loss of so much land as shall be at any time so left out for a foreland." In other words, the loss suffered by the owner whose land is thus left exposed to its fate is in mercantile terms to be treated as a general average loss.

Sect. xiv. provides that if the value of the land "so taken out for the purpose of adding to and enlarging such foreland" is not agreed, a jury is to ascertain and assess the damage and recompense to be awarded to the person having the right to such land; and in that section, and s. xv., the

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proceedings necessary to summon that tribunal and the witnesses to attend before it, are laid down.

Sect. xvi. is the only one of this set of sections which contains the word purchase, and in this manner. It provides that "the money or recompense to be paid for any land which shall be taken or left out for a foreland," to corporations or to persons under a disability, shall be paid in the manner directed and reinvested "in the purchase of other lands." It will be noticed that the money to be received and reinvested in the purchase of other lands is not termed the purchase money arising from the transaction of taking the land of an owner for a foreland, but only as the money or recompense to be paid to him, though it is to be treated as arising from land. The terms of the section justify the observation that at least the nature of the right in the land left out for a foreland, acquired by the Commissioners, is not specified, although the money paid as "recompense" is to be laid out in the *purchase* of alternative land.

In the Lands Clauses Consolidation Act, 1845, an analogous provision is to be found in s. 69. Under s. 68 compensation is payable in respect of lands, or any interest therein injuriously affected by the execution of the works carried out by the undertakers. Then by the closing words of the section and s. 69, that compensation is to be applied, among other purposes, "in the purchase of other lands to be conveyed limited and settled upon the like uses trusts and purposes and in the same manner as the lands in respect of which such money shall have been paid stood settled."

In my opinion, therefore, no deduction can be made from s. xvi. of the Act of 1792 that the money or recompense paid and to be invested in the purchase of other lands, was derived itself from the purchase of the land taken or left out for a foreland.

The Commissioners of Sewers under the Act, 23 Hen. 8, c. 5, were authorized to make new and to cleanse and purge the trenches, sewers and ditches in all places necessary; and in *Duke of Newcastle v. Clark* (1) they were taken to have an

(1) 8 Taunt. 602.

actual possession of the wall and bank and a dam which the defendants had wrongfully pulled down. But it was held that the power and authority to be exercised by them on behalf of the public did not vest in them a property or a possession such as to enable them to maintain an action of trespass.

Again in *Hollis v. Goldfinch* (1) certain undertakers had power under an Act, 16 & 17 Car. 2, to make the River Itchin navigable and to build locks and banks to form the channel of the river. It was held that these undertakers did not necessarily acquire such an interest in the soil in a bank adjoining to and formed out of the earth excavated from a new channel made under the Act, as would enable them to maintain trespass; and also that as the purchase of the soil was not necessary for any of the purposes of the Act, it was to be inferred that no such purchase had been made. Bayley J. says (2) that "as the Act gives them no express power to purchase, and there was no necessity to purchase, therefore, the probability would be, that they never had purchased."

A similar vesting of property in the Commissioners of Sewers as is found in s. x. of the Act of 1792, is effected by s. 47 of the Sewers Act, 1833, and it seems to me, for a like procedural purpose: see *Nesbitt v. Mablethorpe Urban Council*. (3)

In *Conservators of River Lee Navigation v. Button* (4) the Conservators had power to purchase land to carry out their duty to effect the improvement of the navigation of the river. There was no evidence that they had purchased any of the land that lay along the course of the navigation and was used for towing paths. It was held that as the duty of the Conservators under the Act could be carried into effect without purchasing land, the onus lay on them of proving that they had purchased, and it was held that they were not entitled to be treated as owners of the soil of the towing paths.

There is, therefore, no presumption in favour of the present Commissioners that they did in fact purchase the soil. They must prove that they did purchase the fee simple if they

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(1) 1 B. & C. 205.

(2) Ibid. 218.

(3) [1918] 2 K. B. 1.

(4) 6 App. Cas. 685.

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rely upon the acquisition of it. In the absence of affirmative evidence the inference in law points in the opposite direction.

After consideration of the cases referred to, and upon a careful scrutiny of the sections of the Act of 1792, I am of opinion that the conclusion that the Commissioners secured and took away from the owners of the land set out for a foreland the fee simple of it, is not justified. They have not proved that they did in fact purchase the freehold. They could carry out their duties without doing so. The result in my judgment is that there is not an inference to be drawn that the Commissioners are the owners in fee of the land taken from Colonel Dalbiac and set out for a foreland. This conclusion conflicts with the point secondly determined in *Canvey Island Commissioners v. Preedy* (1), and that part of the decision in that case must be treated as overruled.

But it is contended that even if this be so, the plaintiffs are not riparian owners, with a right of access to the Thames. It is said that the river was their foe, and that the ditch and wall served as a rampart to ward off its incursions and effectually stood between the landowners and the tidal water, with the result that all riparian rights belonging to an owner of the soil washed by a river have been lost. On this point an observation must be made at once, arising out of the decision which I have already expressed. The wall or ditch which has been maintained and built, does not interpose a strip belonging to a separate landowner between the estate of Colonel Dalbiac and the river. There is a bulwark which renders the riparian land more valuable, but it does not sever the estate from the river. On this point it is to be noticed that the survey made in May, 1792, contains upon it the representation of a gate which provides access from the bank or road upon it to the sea. There is no indication that Colonel Dalbiac's land has been enclosed and separated from the water.

It is abundantly clear from the speeches of the noble Lords in *Lyon v. Fishmongers' Co.* (2) that a riparian owner on a public navigable and tidal river has the ordinary riparian

(1) [1922] 1 Ch. 179.

(2) (1876) 1 App. Cas. 662.

owner rights. His rights do not depend upon the ownership of the soil over which the stream flows. As Lord Selborne says, it is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream, and he adds that lateral contact is as good as vertical. It seems that provided there is access, the rights accrue to the adjacent owner. I have already pointed out that the means of contact are clearly indicated in 1792, and the bank and ditch were not made to sever the riparian owner from the stream, but to enhance the value of the land to which the riparian rights are attached.

Lastly, it is suggested that because the plaintiffs have not exercised these rights they have lost them. To show that that is not so, it is sufficient to refer to *Sampson v. Hoddinott* (1), where Cresswell J., in delivering the judgment of the Court, said (2) that "all persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will."

For these reasons I am unable to agree with the judgment of Eve J. The appeal will be allowed with costs here and below and a declaration made that the plaintiffs have a good title to the strip of land in question subject to such right or property to or in the embankment, cartway and delf ditch constructed thereon as is vested in the defendant Commissioners under the joint operation of s. x. of the 1792 Act and s. 27 of the 1883 Act, and to a further declaration that the plaintiffs are entitled to erect and maintain above the said strip of land such works as they may require which do not injure the said embankment, cartway or delf ditch, or interfere with the access of the defendant Commissioners thereto for the purpose of inspection and maintenance.

LAWRENCE L.J. The plaintiffs are owners of a freehold farm known as Brick House Farm situate on the south side of Canvey Island in the county of Essex. This farm is

(1) 1 C. B. (N. S.) 590.

(2) 1 C. B. (N. S.) 611.

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protected from inundations of the River Thames (which is tidal and navigable at this point) by certain works, consisting of an embankment, a cartway and a delf ditch constructed in or about the year 1814 by the Canvey Island Commissioners appointed by the 1792 Act. The title to the narrow strip of land upon which these works were constructed forms the only subject-matter now in dispute in this action.

The statement of claim includes a claim for a declaration that the foreshore lying between the strip of land in question and the low water mark of the River Thames is the property of the plaintiffs. The Canvey Island Urban District Council claims to hold a lease of this part of the foreshore from the defendant Commissioners and was accordingly made a defendant in the action. At an early stage of the hearing of this appeal, however, the plaintiffs abandoned their claim for relief against the Urban District Council as they were unable to show any title to the freehold of the foreshore purporting to be comprised in the lease, and the appeal against the defendant Urban Council was consequently dismissed.

As regards the strip of land now in question the plaintiffs have shown a good paper title to it as successors in title of Colonel Dalbiac, who admittedly was the owner when the works were constructed, and they claim that they are now entitled to it for an estate in fee simple in possession, subject only to such right to or property in the embankments and other works constructed upon it as may have vested in the Commissioners by virtue of s. x. of the 1792 Act.

The defendant Commissioners on the other hand claim that their predecessors in title (the Commissioners appointed by the 1792 Act) became the owners of the soil and freehold of this strip of land in the year 1814, under the provisions of ss. x. or xiii. of the 1792 Act, and assert that the plaintiffs have no estate or interest therein.

The claim so made by the defendant Commissioners involves a careful consideration of the relevant provisions of the 1792 Act. The object of the Act was to secure the more efficient protection and preservation of the lands within the Island, which was stated to be not only of importance to the owners

and proprietors of such lands but a matter of public concern, as the produce thereof was considerable and several industrial families were supported by the cultivation thereof. With this object in view certain Commissioners were appointed by the Act and were charged (s. xi.) with the duty of supporting, raising, strengthening and maintaining the then existing embankment walls and drainage works, and of making and erecting such other embankments, walls and drainage works as should be necessary for more effectually protecting, preserving and draining the Island.

In order to enable the Commissioners to carry out the duty thus imposed, and in particular to enable them to take effective legal proceedings for the protection of the works under their charge from injury, the promoters of the Act no doubt considered it advisable, if not essential, that the Commissioners should have some right and property to and in the existing and future embankments and drainage works; accordingly we find that by s. x. of the Act it was enacted that all walls, banks and other works of drainage then erected or being, or which should by virtue of the Act be thereafter made or erected in or upon Canvey Island, and the right and property to and in the same and the materials whereof the same consisted or should consist were vested in the Commissioners for the time being under the Act, who were authorized to bring actions in the name of their treasurer or clerk in respect of any injury done to such walls, banks, other works or materials.

This section does not in terms vest in the Commissioners the land upon which the works are or may be constructed, but only purports to vest in them the works themselves and the materials of which they consist. In this respect it closely resembles s. 96 of the Metropolis Management Act, 1855, and s. 149 of the Public Health Act, 1875, whereby certain streets and the pavements, stones and other materials thereof are vested in local authorities. It has been firmly established by a series of authorities that these last mentioned sections do not operate to vest the soil and freehold of the land upon which the streets are formed in the ordinary sense, from

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the centre of the earth up to an unlimited extent into space, but only the surface of the land and so much space above and below it as is essential to the construction, maintenance and occupation of the street qua street.

By way of illustration I need only refer to two out of the many cases in which this proposition has been affirmed, the first dealing with the space above and the second with the subsoil below, the surface of a street. In *Wandsworth Board of Works v. United Telephone Co.* (1) the question arose whether the defendants were entitled to place and maintain a telephone wire 30 feet above the surface of a street which had vested in the plaintiffs under s. 96 of the Metropolis Management Act, 1855, and it was held by the Court of Appeal that all that vested in the plaintiffs under the section was the surface and so much downwards and upwards from it as came within the ordinary area of user of the piece of ground as a street, and consequently that the defendants were entitled to erect and maintain their telephone wire over the street, such wire being at a height which caused no appreciable damage to the public or to the traffic in the street. In *Mayor, &c., of Tunbridge Wells v. Baird* (2) the question arose whether the urban authority had power to construct lavatories below the surface of a street which had vested in them under s. 149 of the Public Health Act, 1875, and it was held by the House of Lords that they had no such power. Lord Halsbury L.C., in that case, said that he adopted the view expressed by James L.J. in *Rolls v. Vestry of St. George the Martyr, Southwark* (3), that all that vested in the urban authority under the section was the surface and with it such right below the surface as was essential to the maintenance and occupation and exclusive possession of the street and the making and maintaining the street for the use of the public. Lord Halsbury then explained that what Bramwell L.J. must have meant, when he said in *Coverdale v. Charlton* (4) that the local authority had authority to do such things as are commonly done under a street, was such things

(1) (1884) 13 Q. B. D. 904.

(2) [1896] A. C. 434.

(3) 14 Ch. D. 785.

(4) 4 Q. B. D. 104, 118.

as are usually done in a street for the purpose of maintaining it as a street, and which are incident to the maintenance and repair of the street as a street. Lord Herschell, in the same case, said that it seemed to him that the vesting of the street vested in the urban authority such property only as was necessary for the control, protection and maintenance of the street as a highway for public use. Lord Macnaghten, in the same case, said that the meaning of the section was to give the urban authority the control and management of streets coming within the description therein contained, and such statutory right in the nature of a right of property as might be sufficient to authorize them to sue and be sued as occasion might require in the course of such control and management.

In my judgment the ratio decidendi of the cases to which I have referred applies with equal force to the present case in so far as it is based upon s. x. of the 1792 Act, with the result that all that vested in the Commissioners under that section was the surface upon which the embankments and other works were constructed, and so much above and below such surface as was necessary in order that the Commissioners might possess, maintain and control such embankments and other works and sue and be sued in respect thereof. Subject to the right of property so vested in the defendant Commissioners, the plaintiffs are in my judgment entitled to the strip of land in question for an estate in fee simple in possession, and so far as the provisions of s. x. are concerned there is nothing to prevent the plaintiffs from erecting and maintaining above the embankment, cartway and delf ditch constructed on this strip of land, such works as they may require which do not injure such embankment, cartway or delf ditch, or interfere with the access of the defendant Commissioners thereto for the purpose of inspection and maintenance.

A more difficult question, however, arises upon the claim made by the defendant Commissioners that their predecessors in title purchased the strip of land under the powers conferred upon them by s. xiii. of the 1792 Act.

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Sect. xiii. empowers the Commissioners to set the then existing and any future walls, embankments or works further inward into the Island and to set out a larger part of the Island for a foreland for the preservation of the residue thereof, and provides that in such a case the other owners and proprietors of lands in the Island should contribute a rateable part towards the loss of so much land as should be so left out for a foreland to the person or persons whose land should be so taken or left out for such purpose, and the Commissioners were required to make reasonable satisfaction to the person or persons whose land should be so taken or left out for such purpose as aforesaid.

From the minutes of the proceedings of the Commissioners the following facts relevant to the present case are to be gathered :

On June 16, 1813, the Commissioners, deeming it expedient that part of the walls (including the wall opposite to Brick House Farm) should be set further inward into the land, and that a larger part of the Island (including part of Brick House Farm) should be set out for a foreland for the better preservation of the residue thereof, resolved that a new inset therein specified be made in the ensuing season, and that reasonable satisfaction be made to the person or persons whose lands should be so taken or left out for such purpose as directed by the Act.

In pursuance of this resolution the new inset was proceeded with, and Colonel Dalbiac applied to the Commissioners for satisfaction for the loss of so much of Brick House Farm as had been taken and left out for the purpose of a foreland, demanding a reasonable compensation for the same. The Commissioners thereupon, on May 14, 1814, resolved that a sum of 40*l.* per acre be allowed to Colonel Dalbiac as a reasonable satisfaction for the loss of such land. Colonel Dalbiac, who was present at the meeting, agreed to accept this sum “ as the full consideration for the value thereof,” and the Commissioners thereupon further resolved that such sum be paid to Colonel Dalbiac after ascertaining the exact quantity of the land so lost.

The Commissioners accordingly, at their next meeting on May 10, 1815, resolved that the lands lately set out as a foreland should be admeasured by a proper judicious person to ascertain the quantities of land taken from each farm, and that such person be instructed to admeasure the same from the inside of the delf ditch of the new wall (which apparently had then been constructed) to the inside of the delf ditch of the old wall and that he do make a map of the same.

In pursuance of this resolution a survey and plan were made of the lands set out as a foreland, which clearly show that the quantity of land so set out forming part of Brick House Farm was 16 acres and 4 poles, and included the strip of land now in question.

From the entries in the ledger kept by the Commissioners it appears that they paid the agreed compensation to Colonel Dalbiac in part in the year 1816, and the remainder in the year 1817. In the earlier entry the amount so paid is described as "in part valuation on his land taken as a foreland," and in the later entry as "the remainder of compensation due to him for land taken as a foreland." Colonel Dalbiac was never asked to convey the land which the Commissioners had set out as a foreland to them, nor did he in fact execute any such conveyance. It is not suggested that any of the other landowners in the Island whose lands were taken or left out on this or on any other occasion were ever asked to or did in fact convey such lands to the Commissioners.

The defendant Commissioners, however, contended before us that the result of s. xiii. and of the payments so made to Colonel Dalbiac was that they acquired the strip of land by purchase from Colonel Dalbiac and became entitled to the strip of land for an equitable estate in fee simple, and that the plaintiffs have no title thereto or interest therein.

In my opinion this contention is not well-founded.

The 1792 Act does not confer any express power on the Commissioners to purchase or hold land. The Act did not vest the then existing foreland of the Island in the Commissioners and there is no apparent reason why any land which they might thereafter deem it advisable to set out for the

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purpose of adding to and enlarging that foreland should become their property. The duties imposed upon the Commissioners by the Act did not require that they should become the owners of the foreland of the Island, and it was deemed sufficient for the purposes of the Act only to vest in them the walls, embankments and other drainage works; the express vesting of these works and the absence of any provision vesting the forelands tends strongly to show that no such vesting was contemplated. I can readily understand the omission of any power compulsorily to purchase any land required for the purpose of adding to and enlarging the foreland, as it formed no part of the scheme of the Act to cut off the riparian proprietors in the Island from access to the River Thames further than was necessarily involved by the interposition for their protection of an embankment between their lands and the river. If all that an Act gives the undertakers authority to do might be accomplished without the purchase of the soil there is no reason to suppose that the soil would be purchased: see per Abbott C.J. in *Hollis v. Goldfinch*. (1)

Moreover, had the purchase of any land required for the purpose of adding to the foreland been within the contemplation of the Legislature, it would have been easy to have expressed that intention in clear language, and in that case I should have expected the Act to contain the usual clauses (then well known and commonly introduced into Acts relative to the compulsory acquisition of lands required for undertakings of a public nature) which eventually were incorporated in the Lands Clauses Consolidation Act, 1845, providing for the conveyance of the lands purchased and for the vesting of any lands which might be in the ownership of persons who refused to convey or were incapable of conveying. In the absence of any such provisions it is difficult to see how the Commissioners could possibly acquire a title to such last mentioned lands. Moreover it is to be observed that the compensation to be paid to the owners of lands taken or left out for the purpose of a foreland, although described in various

(1) 1 B. & C. 205, 215.

ways in the Act, is never referred to as "purchase money" or "price."

Much reliance was placed by the defendant Commissioners upon the provisions of ss. xiv. and xvi. of the Act.

Sect. xiv. deals with the ascertainment of the compensation in default of agreement, and provides (*inter alia*) that if the owners of the land taken out for the purpose of adding to or enlarging the foreland of the Island should not agree with the Commissioners concerning "the value thereof" a jury was to assess "the damage and recompense" to be awarded to such owners. The contention that because this section refers to a disagreement between an owner and the Commissioners as to "the value" of his land, therefore the damage and recompense payable under s. xiii. is stamped with the character of purchase money, with the result that in every case on payment of such damage and recompense the Commissioners became purchasers of the land, seems to me somewhat far-fetched and ill-founded. The mention of the value of the land in the earlier part of s. xiv. may well be held to imply a direction to the jury to assess as damage and recompense an amount equal to the full value of the land, but nothing more. It does not seem unreasonable that if part of a farm formerly within the sea wall be left outside and abandoned to the mercy of the tides, with the inevitable result that it will become useless for farming purposes, the compensation to the owner should be measured by the full value of the land, but it by no means follows that the owner of that land should on payment of the compensation be expropriated and deprived of all right of access to the river in respect of the remainder of his land.

Sect. xvi. provides that the money or recompense so paid for any land taken or left out for a foreland belonging to any corporation or incapacitated person is to be re-invested in the purchase of other lands which are to be conveyed and settled upon the like uses, trusts and limitations as the land so taken or left out should be then settled, limited or assured. This provision in my opinion does not support the contention that the land taken or left out had before such re-investment

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been vested in the Commissioners, and no longer belonged to the corporation or incapacitated person, but rather the contrary. The provision is one which is similar to the provision usually introduced into Acts conferring compulsory powers the exercise of which may cause damage to land : see ss. 68 and 69 of the Lands Clauses (Consolidation) Act, 1845. Under such a provision the compensation paid for injuriously affecting settled land or land owned by persons under disability is invariably and rightly treated as capital money arising in respect of such land, and is directed to be invested accordingly. Moreover, s. xiv. assumes that at the time when the " other lands " are purchased, conveyed and settled in accordance with the section, the lands set out as foreland in respect of which the compensation has been paid will still be standing settled as theretofore.

So far I have dealt with this case on the footing that the strip of land in question was in fact set out by the Commissioners as a foreland under s. xiii. It has suited both parties (although for different reasons which I need not enter upon) to argue the case on that footing. On that assumption, which also forms the foundation of the decision of the learned judge in the Court below, I have come to the clear conclusion, for the reasons which I have stated, that the Commissioners did not purchase or become the owners of the strip of land, but that it remained vested in Colonel Dalbiac, subject, of course, to such right of property in the works constructed thereon as became vested in the defendant Commissioners under s. x. of the Act. It follows, therefore, that I differ from the conclusion reached by the learned judge on this point, both in the present case and in *Canvey Island Commissioners v. Preedy* (1), though I think that the decision in the latter case in so far as it was founded upon *Attorney-General v. Tomline* (2) was right.

I confess to having some doubt, however, whether in the circumstances of the present case the strip of land in question was in fact taken or set out as a foreland within the meaning of s. xiii. of the 1792 Act, although it was undoubtedly

(1) [1922] 1 Ch. 179.

(2) (1879) 12 Ch. D. 214.

included in the plan of the lands so purported to be set out, and Colonel Dalbiac apparently received compensation on that footing. This depends upon the meaning of the word "foreland" in that section. The more usual and natural meaning of this word in the context in which it occurs is a strip of land in front of the works constructed as a protection against inundations of the river, and would not include the site of such protective works. Thus in the Act of 23 Eliz. c. 13, s. 2, the following phrase occurs: "Certain shelves and forelands lying between the walls and bounds of the said marshes and the River Thames"—and in the Transactions of the Society of Arts (1807), the phrase: "By the erection of a new bank or sea wall they got a foreland to their former estate."

These quotations are taken from the Oxford Dictionary, where the first definition of "foreland" is "a cape, headland or promontory," and the second, "a strip of land in front of something." The latter definition clearly gives the meaning in which the word is used in s. x., and the only question is whether in that section it means the strip of land in front of the new embankment or the strip of land in front of the plaintiff's farm. In my opinion the former is the preferable meaning. Under s. xi. of the 1792 Act the Commissioners had ample power to construct a bank or wall and other protective and drainage works on the lands of Colonel Dalbiac on making satisfaction for any damage occasioned thereby without having to set out any land as a foreland. As, however, the damage for constructing the new works would have had to be assessed in the same way and on the same principle as the compensation for the land taken or left out as a foreland, it was no doubt thought more convenient to deal with the matter as one transaction and make one assessment of the compensation payable in respect of both the land which was to become foreland and the land upon which the new embankment was to be constructed. This fact, however, cannot alter the construction of the Act nor give to the Commissioners a power which was not conferred upon them by the Act. I do not think that there is any need to pursue this subject any

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further as, whichever may be the right way of looking at the matter, it leads, in my judgment, to the same result, because, in either case, the new works constructed on the strip of land in question would have vested in the Commissioners under s. x., and subject to such vesting the strip of land would have remained the property of Colonel Dalbiac and now belongs to the plaintiffs.

There is only one other contention to which I need refer—namely, that the 1883 Act contains an interpretation of the 1792 Act which compels the Court to hold that the Commissioners had, under the latter Act, power to acquire and did in fact acquire the strip of land in question, either under s. x. or under s. xiii. of the 1792 Act. In support of this contention the defendant Commissioners relied, first, upon the statement contained in the preamble of the 1883 Act that by the 1792 Act the Commissioners thereby appointed were invested with powers (*inter alia*) of acquiring lands in the Island for the purposes of the Act and, secondly, upon the provision contained in s. 34 of the 1883 Act that the soil of all walls, banks or other works which should be discontinued or abandoned should vest in and become the property of the owners of the lands adjoining thereto.

In my opinion the erroneous recital of the effect of the 1792 Act does not affect the construction of that Act. As already stated, the 1792 Act does not in my opinion confer any power upon the Commissioners to acquire lands for the purposes of the Act, and the recital in the 1883 Act that it does contain such a power cannot operate retrospectively so as to make the 1792 Act read as if such a power had originally been contained therein.

So far as s. 34 of the 1883 Act is concerned, it has to be borne in mind that before the two cases which I have cited on the vesting of streets had been decided, a doubt had arisen as to the ownership of the soil of a street after the street had been stopped up and abandoned as such by the local authority, and that in *Rolls v. Vestry of St. George the Martyr, Southwark* (1), decided in the year 1880, this question had

been debated and decided in favour of the landowner. This probably accounts for the provision in s. 34 of the 1883 Act, which was passed shortly after that case, and was no doubt intended to prevent any question arising as to the ownership of the site of any works after they had been abandoned by the Commissioners. This enactment in my judgment in no way enlarges the right of property acquired by the Commissioners under s. x. of the 1792 Act, and has no bearing on the construction of that section. Moreover the House of Lords, in *Ormond Investment Co. v. Betts* (1), held that it was not permissible to construe an unambiguous phrase in an earlier Act by an erroneous assumption of its effect contained in a later Act which did not purport to alter or amend the earlier Act.

In the result, for the reasons stated, I agree that this appeal should be allowed with costs here and below, and that the plaintiffs are entitled to the declarations indicated by the Master of the Rolls.

ROMER L.J. The appellants, the Port of London Authority, are the owners of land in Canvey Island that abuts upon certain works, consisting of a wall or embankment, a dyke, and a cartway, constructed in or about the year 1813 by certain Commissioners acting in pursuance of powers conferred upon them by the Act 32 Geo. 3, c. 31. These works, hereinafter in this judgment referred to as the new wall, separate the appellants' lands from the tidal waters of the River Thames, and the object of this action is in effect to establish their right to carry pipes across the new wall for the purpose of conveying petroleum to barges and other vessels on the Thames from a petroleum storage depot which they are proposing to erect upon their said lands. Whether they have or have not this right depends upon the nature and extent of the interest in the new wall and in the site which it occupies that was vested in the Commissioners under the Act in question. For, so far as that interest was less than an absolute fee simple, the site of the new wall is, subject to such

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(1) [1928] A. C. 143, 154.

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interest, admittedly vested in the appellants. It is contended by the respondents, the Canvey Island Commissioners, who are the successors in title of the Commissioners under the Act of 1792, that such interest was an absolute estate in fee simple, and Eve J. has so held. It is contended on the other hand by the appellants that the Commissioners merely obtained an interest similar to interests in streets and sewers that were vested in local authorities under the Public Health Act, 1875. If the former view be accepted the appellants obviously have no right to carry their pipes over the new wall. Should the latter view prevail, they will have such a right so long as they do not interfere with the defendant Commissioners in the performance of the duties of effectively maintaining and repairing the new wall. Which of the two views is the correct one is the question that has to be decided upon this appeal. It is one which is of great difficulty, and necessitates a close examination not only of the relevant provisions of the Act but also of certain authorities to which our attention was called during the argument.

The Act is intituled "An Act for more effectually embanking draining and otherwise improving the Island of Canvey in the County of Essex," and appears to have been passed in the following circumstances. At some time during the seventeenth century a Dutchman had protected, or possibly reclaimed, the Island from the sea by building round it a wall which has been referred to in this case as the old wall. In consideration of his services the Dutchman was rewarded by a grant of a third of the lands contained within the Island, the lands so granted to him being called the Third Acre lands, and subjected to and made chargeable with the cost of keeping the old wall in repair, and of protecting and preserving the whole of the lands within the Island. After the construction of the old wall, further lands outside it, called the Outsands, were at different times recovered from the sea by private persons, who threw up further embankments, and who kept such embankments in repair at their own expense. In course of time, however, the old wall and other embankments had fallen into a ruinous state so that there

was great reason to fear that the whole Island would in a short time be totally lost.

The Act accordingly, after reciting some of these facts, appointed certain persons Commissioners, and, after providing for filling up vacancies in their body and matters of that kind, enacted by s. x. as follows: "And be it further enacted, That the several walls and banks, and the fleets, sluices and tunnels now erected, standing, and being in or upon the said Island (save and except such walls, banks, and works as have been made by private persons since the first embankment of the said Island, to fence in and protect the said parts called The Outsands), and all walls, banks, fleets, drains, sluices, tunnels, and works of drainage, which shall by virtue of this Act be made, erected, or cut, in or upon the said Island, for the purpose of embanking, preserving and draining the same or any part thereof, and the right and property to and in the same, and the materials whereof the same do or shall consist, shall be and are hereby vested in the said Commissioners for the time being, and they may and are hereby authorised to cause an action to be brought in the name of their treasurer or clerk, or to order and direct the preferring of indictments or other prosecutions against any persons or person who shall break, cut, pull down, dig up, steal, take, carry away, destroy, spoil, or injure any of such walls or banks or other works or the materials whereof the same do or shall consist; and no such action as aforesaid shall abate or be discontinued by the death or removal of the treasurer or clerk in whose name the same shall be brought."

By s. xi. the Commissioners were empowered and directed to keep up the then existing walls or banks and the other works of drainage except as aforesaid, and also to make and erect such other banks or walls and works as should be necessary for the protection, preservation and draining of the Island, "making satisfaction for any damage occasioned thereby," and provided that in case of difference such damage should be ascertained in like manner as was thereafter directed with respect to the satisfaction or recompense to

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Pausing there, it should be stated that s. x. is the only section in the Act that expressly vests anything in the Commissioners. It applies to the old wall and the other then existing works, such as fleets, sluices and tunnels. It also applies to all walls, banks and other works that should be made thereafter under the powers conferred by the Act. It is, however, to be observed that no compensation is provided for the owners of the soil upon which the old wall and other existing works were situated, and as regards any new works the only compensation payable is in respect of any damage occasioned by their erection.

I shall have to return to this matter later when I come to consider the extent of the vesting effected by s. x. Before doing so, however, it will be convenient to consider some of the ensuing sections, and especially s. xiii. I will not take up time by reading it again, but it is necessary to make one or two observations upon it; for in erecting the new wall the Commissioners purported to be exercising the powers conferred upon them by this section. The first observation to be made is that the Commissioners had ample power to construct the new wall under s. xi., and s. xiii. was quite unnecessary for that purpose. Sect. xi. had, however, imposed upon the Commissioners an obligation to maintain the old wall, and s. xiii. was required to free them from a continuance of that obligation if and when the Commissioners thought it expedient that the old wall should be abandoned. It was, of course, obvious that, if the old wall were removed or even allowed to fall into disrepair and a new wall constructed in place of it further inland, the land left within the site of the two walls must speedily become useless. The section accordingly went on to provide, as one might have expected, that in such case the persons whose land had been rendered worthless should be compensated for their loss by the owners of the lands for whose benefit the land in question had been sacrificed. It is, in my opinion, the land that was so sacrificed that is referred to in the section as a foreland.

According to the Oxford Dictionary, one of the meanings of "foreland" is a strip of land in front of something, and reference is there made to an Act of Elizabeth referring to "certain shelves and forelands lying between the walls and bounds of the said marshes and the River Thames." In other words, I do not think the word "foreland" in the section was intended to include the new wall. The section seems to refer to the setting of the walls further inward and the setting out of further land as a foreland as two distinct matters, but to provide that compensation shall only be paid for the loss of land taken or left out as a foreland. Nothing is said in the section, as I read it, about compensation being paid for the land on which the new wall should be built, and for a sufficient reason. Sect. xi. had already provided that satisfaction should be made for any damage occasioned by the erection of the new wall. It is also to be noticed that what is called a "foreland" in the section is something that is "left out," or, to use the expression in s. xiv., "taken out," words that seem to suggest that the land will be outside the new wall.

The next observation to be made about s. xiii. is that nothing is said as to the foreland vesting in the Commissioners. This again seems to me quite intelligible. I can see no reason why it should so vest. For the Commissioners as such could have no use for land that was shortly going to be swallowed up by the sea, and even if, contrary to my view, the foreland included the new wall, all such vesting as was considered necessary by the Legislature for such a structure had been provided for by s. x. The land outside might well be left vested in the owners, even though the sum paid to them as compensation, whether by agreement or by assessment under s. xiv., should amount to the full value of the land. There is, moreover, in s. xvi., a slight indication of the Legislature's intention that the foreland should remain so vested; for it provides that the money or recompense paid for the land taken or left out shall in certain cases be reinvested in the purchase of other lands which shall be conveyed and settled to the like uses, trusts, and limitations as the land taken or

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left out shall be then settled, limited, or assured. This seems to contemplate that down to the date of the conveyance or settlement the foreland will not have vested in the Commissioners. In this connection the language of s. xvi. may be usefully compared with that of s. 69 of the Lands Clauses Act, 1845. This section of the Act of 1792 on the same reasoning tends to show that the foreland does not include the new wall. For some interest in the new wall would undoubtedly have vested in the Commissioners under s. x., though what that interest was will have to be considered later. It may further be observed that if the interest in new walls and other new works vested in the Commissioners under s. x. be less than the fee simple in the sites upon which they are constructed, it is not easy to understand why a greater interest in any new wall should be vested in the Commissioners because it was constructed under s. xiii. Therefore, either the new wall is not included in the word "foreland," or, if it be included, no vesting of the foreland in the Commissioners takes place by virtue of ss. xiii., xiv. and xvi., and the only vesting of the new wall takes place under s. x. But, apart altogether from these considerations, the fact remains that the Act of 1792 nowhere purports to vest in the Commissioners the foreland taken or left out under s. xiii. ; that they are not, in terms at any rate, given any power of purchasing that land or any other land ; and that there was no need for the Commissioners to purchase it for the purpose of carrying out their duties or exercising their powers under the Act.

For these reasons I have come to the conclusion that the Commissioners never obtained any interest in the new wall under ss. xiii., xiv. and xvi., either because it was not included in the word "foreland," or because, even if it were so included, no interest in the foreland became vested in the Commissioners under those sections : see *Hollis v. Goldfinch* (1) and *Conservators of River Lee Navigation v. Button*. (2)

I will only add this upon this part of the case. If I am right in the construction I have put upon ss. xiii., xiv., and xvi., and the site of the new wall was not included in the

(1) 1 B. & C. 205, 215, 218, 220.

(2) 6 App. Cas. 685, 691.

word "foreland," the fact that both the Commissioners and Colonel Dalbiac proceeded upon the footing that it was, cannot in my judgment affect the matter. It may be that the Colonel thereby obtained a larger sum for the damage sustained by him by the erection of the new wall than he might otherwise have obtained. But, even assuming that the sections, contrary to my opinion, did effect a vesting of the fee simple in the foreland in the Commissioners, the fact that the parties treated the foreland as including the new wall could not have resulted in a similar vesting of the new wall's site.

In these circumstances, it becomes necessary to ascertain what interest the Commissioners obtained in the new wall and its site under the provisions of s. x.

Questions of this nature have frequently been the subject-matter of decisions of the Courts in relation to streets and sewers vested in a local authority under the provisions of ss. 149 and 13 respectively of the Public Health Act, 1875. In *Coverdale v. Charlton* (1) it was decided by the Court of Appeal that the earlier section did not operate to vest the whole soil upon which the street has been formed so as to carry the right to the land to an indefinite extent upwards and to the centre of the earth below the surface. Bramwell L.J. said that the word "street" in the section comprehends a surface only of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street and those things which commonly are done in or under the streets, and that to that extent the local board has a property in it. This case was followed by the Court of Appeal in *Rolls v. Vestry of St. George the Martyr, Southwark* (2), where James L.J. said that it decided that the board had only the surface of the street and with the surface such right below the surface as was essential to the maintenance and occupation and exclusive possession of the street, and the making and maintaining the street for the use of the public. This statement of James L.J. was adopted by Lord Halsbury in addressing the House of

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(1) 4 Q. B. D. 104.

(2) 14 Ch. D. 785.

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Lords in *Mayor, &c., of Tunbridge Wells v. Baird* (1), where he also explained what it was that Bramwell L.J. meant in *Coverdale v. Charlton* (2) when he said that a street included those things which commonly are done in or under a street. "I think," said Lord Halsbury, "what his Lordship must have meant was such things as are usually done in a street for the purpose . . . of maintaining it as a street, and which are incident to the maintenance and repair of the street as a street. For that purpose it would be intelligible. For any other purpose it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued of not taking private rights without compensation." This last observation of Lord Halsbury is important, because it indicates the reason, or at any rate the principal reason, that underlies the cases relating to the vesting of streets and that has induced the Court to confine the operation of the word "vest" in s. 149 of the Public Health Act, 1875, to what has been called the "area of user": see *Finchley Electric Light Co. v. Finchley Urban Council*. (3)

A similar restriction has been put upon the word "vest" in relation to sewers. In *Taylor v. Corporation of Oldham* (4) Sir George Jessel was considering the effect of a local Act which empowered the Oldham Corporation to make sewers under any streets, and contained a section by which all existing and future sewers were vested in the Corporation. As to this section he said (5): "Now, that is a very useful provision. It was found under the old law, and it was sometimes held, that the sewer authorities (they were not called sewer authorities in those days) had only an easement, and it was found to be very inconvenient, and consequently in the modern Acts the property in the sewers has been vested in the sewer authorities. That is to say, that instead of allowing the subsoil to remain in the owner of the soil, subject to an easement or right of sewerage or drainage, the absolute

(1) [1896] A. C. 434, 439.

(3) [1903] 1 Ch. 437, 441.

(2) 4 Q. B. D. 104.

(4) (1876) 4 Ch. D. 395.

(5) (1876) 4 Ch. D. 411.

property in the sewer (which means not merely the brick barrel, or whatever it may be, forming the sewer, but the whole interior of the sewer, that is, the whole of the space occupied by it) is now vested in the sewer authorities. And if the sewer is a large one, it amounts, in substance, for all useful purposes, to the whole of the subsoil, and that is absolutely vested in the corporation."

It is to be observed that the Act in question contained a clause providing compensation for the owner or occupier of any lands injuriously affected by the exercise of the powers relative to sewers conferred by the Act upon the Corporation. There was, however, no compensation provided for the owners or occupiers in respect to any interest in the soil of which they were deprived by the operation of the vesting section, and it is the absence of provision for compensation of that nature that is material. In that particular case it was not, as a matter of fact, necessary for Jessel M.R. to consider the precise nature of the interest in the soil that vested in the Corporation. He was only concerned to show that it was an interest in the soil itself that vested, and not merely an easement. But his statement as to the extent of that interest has been adopted in other cases: see, e.g., *Ystradyfodwg and Pontypridd Main Sewerage Board v. Bensted*. (1)

In *Bradford v. Mayor, &c., of Eastbourne* (2) the late Lord Russell of Killowen had to consider the effect of s. 13 of the Public Health Act, 1875, and said (3): "But what is the meaning of the word 'vest' in s. 13 of the Act of 1875? It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter."

These cases show that the word "vest" in s. 13 of the Public Health Act, 1875, has only a limited effect, and though it passes an interest in the soil itself and not merely an easement, the interest is no greater than is requisite to enable

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(1) [1906] 1 K. B. 294, 306.

(2) [1896] 2 Q. B. 205.

(3) [1896] 2 Q. B. 211.

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the local authority to control and maintain the sewer. In this connection it is to be observed that by s. 308 of the Public Health Act compensation is payable to any person who sustains any damage by reason of the exercise of any of the powers of the Act. The owner of land through or under which a sewer is carried by a local authority is therefore entitled to be compensated for the damage he thereby sustains. There is nothing however in the Act that seems to contemplate that he will be compensated for being deprived of his interest in the soil. The vesting section must therefore be construed so as to give to the local authority the least interest in the soil that is compatible with the proper exercise of the powers given to the authority in relation to the sewer.

These authorities seem to me to have a direct bearing upon the effect of s. x. of the Act of 1792. It seems probable from the latter part of the section that the Legislature in enacting it had in mind the difficulties that the Commissioners would experience in its absence in any proceedings they might desire to take for the purpose of protecting the works placed under their care. A striking instance of what those difficulties would have been was afforded some years later in *Duke of Newcastle v. Clark*. (1) If this were so one would not have expected the Legislature to vest in the Commissioners any greater interest than was necessary to ensure the object that it had in view. But, however this may be, the Act provides no compensation to the owners or occupiers of land for being deprived of their interest in the soil on which the various works specified in s. x. were then erected or might be erected in the future. They are merely compensated for any damage occasioned to them by the exercise of the powers conferred upon the Commissioners by s. xi., and neither that section nor any other section in the Act purports to confer upon the Commissioners power of purchasing land for the purpose of those powers. In these circumstances, it is in my opinion necessary to treat the vesting provided for by s. x. as operating only to confer upon the Commissioners an interest analogous to that taken by local authorities in streets and sewers under

(1) 8 Taunt. 602.

the Public Health Act, 1875. It is true that in the present case Colonel Dalbiac was compensated in respect of that part of the new wall that was erected on his land by receiving a sum that was equivalent to the value of the freehold of the soil. But this may well have been considered by him at the time to be the measure of his damage, for it is possible that Mr. Gavin Simonds is right in his conjecture that in those days a means of access to the sea from the land behind the wall was not treated as a thing of any value, and, apart from this right, the land occupied by the new wall would be rendered useless to its owner. But, in any case, the section does not apply merely to the new wall, or merely to walls and banks. It applies to all the then existing fleets, sluices, and tunnels, and to all fleets, drains, sluices, tunnels and works of drainage to be thereafter made, erected, or cut upon the Island for the purposes indicated. If the section had the effect of vesting in the Commissioners the whole interest in the land occupied by the new wall, it must have had the effect of vesting the whole interest in the land occupied by all these other works. The section must receive the same construction whatever be the particular work to which it is applied, and whatever may be the compensation paid for the damage that the work occasions to the owner or occupier of the land on which it is made. The section, moreover, applies to the then existing works as well as to those made in the future. There is no evidence to show what precisely were the works then existing in addition to the old wall, or in whom the sites of those works and of the old wall were then vested. If, however, the defendant Commissioners are right in their contention, the fee simple in the whole of these sites (with one exception) vested in them, and that without paying a penny of compensation to those whose interests were divested. The exception to which I have referred is to be found in s. xlii. of the Act. That section provides, amongst other things, that nothing in the Act shall lessen or defeat the rights or interests of any person or persons of in or to the liberty of fishing in or upon any of the fleets in the said Island or the soil thereof. It was contended on the part of the defendants that this section indicates that in

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the view of the Legislature the fee simple in the soil of the fleets would, but for its provisions, have vested in the Commissioners. I cannot accept this contention. All that I can gather from this reference to the soil of the fleets is that, for some reason or another, the Legislature desired that whatever interest in the soil of the other works should have been vested in the Commissioners by the Act, the Commissioners were to have no such interest in the soil of the fleets. The section throws no light upon what that interest was. Nor indeed can I find any other section of the Act later than s. xvi. that gives me any assistance in determining the question with which I have dealt in this judgment. Sects. xxxi. and xxxii. were relied upon by the plaintiffs as being sections that were unnecessary if the Commissioners took the absolute interest in the soil for which the defendants contend. The sections, however, confer rights and remedies upon the Commissioners in excess of those which an owner of land possesses, and in my opinion throw no light upon the matter in dispute.

It only remains to deal with the contention of the defendants based upon the Canvey Island (Sea Defences) Act of 1883. It is said that that Act can and ought to be treated as throwing light upon the proper construction to be placed upon the Act of 1792. It was said that it shows by the preamble that the Commissioners were invested under the earlier Act with powers of acquiring lands in the Island for the purposes of the Act, and by s. 34 that the whole fee simple in the soil of all the walls, banks, and other works over which the Commissioners had jurisdiction was vested in them. That in certain circumstances and within certain rigid limits a later Act may be regarded for the purpose of solving questions of construction arising under an earlier one must be conceded: see *Ormond Investment Co. v. Betts*. (1)

But the preamble to the Act of 1883 recites that the Act of 1792 conferred a power which in my judgment it obviously did not, and s. 34 does not in my opinion indicate what it is alleged to do; for the section merely re-vests the soil in the

(1) [1928] A. C. 143, 156.

adjoining owners without indicating what is the precise interest so re-vested.

In my opinion this appeal should be allowed with costs here and below, and declarations made in the terms stated by the Master of the Rolls in his judgment.

Solicitor for Port of London Authority : *J. D. Ritchie.*

Solicitors for Canvey Island Commissioners : *Kingsford, Dorman & Co., for Gregsons & Saul, Southend-on-Sea.*

Solicitors for Canvey Island Urban District Council : *Engall & Crane.*

W. I. C.

In re MORTON.

MORTON *v.* MORTON.

[1931. M. No. 3257.]

EVE J.

1932

Jan. 12, 19.

Family Arrangement—Division of Intestate's Estate—Agreement between Brothers to give Equal Share to Niece—Non-execution by Interested Party—Whereabouts unknown—Subsequent Appearance and Refusal to concur—Invalidity.

A family arrangement for the division of an estate entered into in the absence or without the knowledge of one of the parties or persons interested in and affected thereby is not binding on any of the parties unless his concurrence is subsequently obtained.

On the death of W. M. without having made an effective will, and leaving his five brothers his next of kin, four of them joined with a niece in executing a deed of family arrangement, whereby the niece, who had been living with W. M. and his wife (who predeceased him), and for whom W. M. desired to make provision, was to be given an equal one-fifth share with the four brothers. The fifth brother T. M. was not a party to the deed, as at the date thereof he had not been heard of for over twelve years, and it was uncertain whether he was living or dead. Since the date of the deed the whereabouts of T. M. had been discovered, and he refused to concur in it :—

Held, that the arrangement was not binding on any of the parties thereto.

Peto v. Peto (1849) 16 Sim. 590 followed.

ORIGINATING SUMMONS.

The facts were stated by Eve J. in his judgment as follows :

By a will dated February 7, 1914, William Morton devised and bequeathed all his real and personal estate to his wife absolutely and appointed her his sole executrix. He died on

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September 26, 1928, having survived his wife for a period of three months or thereabouts and without having made any testamentary disposition other than the will mentioned. He therefore died intestate, and the persons entitled to his estate under the Administration of Estates Act, 1925, were his five brothers, the two plaintiffs to whom letters of administration were granted, the first two defendants, and Tom Morton, whose whereabouts were unknown and who had not been heard of for upwards of twelve years at the date of the death.

In the period elapsing between the death of his wife and his own death the intestate had expressed his intention of making some provision for his niece the defendant Maud Handley (then Maud Morton), who had lived with the intestate and his wife from early infancy.

In these circumstances a deed of family arrangement was entered into on September 29, 1928, between the four brothers, parties to the action, of the first part, and the defendant Maud Handley of the second part, whereby after reciting the facts stated above and that the parties thereto of the first part had agreed to respect the wishes of the intestate by making provision for the said Maud Handley as therein-after mentioned and contained, it was witnessed that in consideration of the premises the estate of the intestate should be administered as though he had died having made and duly executed a valid will whereby he had devised and bequeathed his real and personal estate to the four brothers, parties to the action, Tom Morton, if living at the date of the intestate's decease, or the children, if any, of the said Tom Morton if he should be dead, and the said Maud Handley in equal shares, the children of the said Tom Morton, if any, taking the share which Tom Morton would have taken had he been living at the date of the intestate's death.

Since the date of the deed the whereabouts of Tom Morton, who was still living, had been discovered, and he refused to concur in or give effect to the proposed arrangement, insisting on his right to receive one-fifth of the estate. The administrators therefore issued this summons for the determination

of the question whether the deed was binding on the parties thereto.

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P. M. Walters for the plaintiffs.

R. W. Goff for the first two defendants, brothers of the intestate. The deed does not bind Tom Morton, as he now refuses to execute it, and as the arrangement was entered into on the assumption that if still living he would eventually join in it, the result is that it does not bind any of the parties : *Peto v. Peto* (1) ; *Bolitho v. Hillyar*. (2)

Wilfrid Hunt for the defendant Maud Handley. There is no principle that this defendant should be deprived of everything that she takes under the deed, because one of the persons interested refuses to concur. She is entitled to one-fifth of four-fifths share, and is willing to accept that instead of the one-sixth that was originally provided for her. This is a contract between five persons all of whom executed the deed, and the interest of each is bound by it. The cases of *Peto v. Peto* (1) and *Bolitho v. Hillyar* (2) are distinguishable. In *Peto v. Peto* (1) the brother, James, who refused to concur was abroad at the date of the deed, but he was made a party to it, and asked to execute it and refused to do so. A deed of confirmation was entered into by the other parties to which he was again made a party, and again he refused. In that case the Court was clearly entitled to infer that the covenants of the executing parties were conditional upon the deed being executed by all. The same applies to *Bolitho v. Hillyar* (2), where the Court held that a married woman having joined with her husband in assigning a reversionary interest was not bound by the deed, as the husband died before the interest fell into possession, and therefore the other parties who executed the deed were not bound.

Cur. adv. vult.

1932. Jan. 19. EVE J. [after stating the facts as set out above :] A family arrangement of this nature come to by the persons who have signed the deed without the knowledge or

(1) (1849) 16 Sim. 590.

(2) (1865) 34 Beav. 180.

EVE J. in the absence of one member of the family intended to be
1932 affected thereby, is regarded, in the absence of any proviso
MORTON, to the contrary express or implied, as having been entered
In re. into on the assumption that the absentee will in due time
MORTON join in the transaction. His concurrence is therefore an implied
v. condition of the validity of the arrangement, and if it is not
MORTON. obtained, the arrangement is not binding on any of the
— parties to it.

Authority for this proposition is to be found in the cases of *Peto v. Peto* (1) and *Bolitho v. Hillyar*. (2) In the former of these cases, where the facts were not dissimilar from those of this case, seven out of eight children of Ann Grissell entitled to a fund equally in the event of their surviving their mother executed a deed whereby they severally covenanted with each other reciprocally that in case any of them should die in the mother's lifetime leaving a child or children such child or children should be entitled to the share or shares of the parent or parents in such and the same manner as if each parent or parents had survived the mother. The eighth child was named as a party to the deed, but at the date of the deed he was abroad in India and never executed it. He and six of the seven survived the mother, the remaining child died in the mother's lifetime leaving children who brought the action, claiming to be entitled under the deed to their parent's share. For the plaintiffs it was argued that the parties who executed the deed were bound by the arrangement as regards their respective shares of the fund; but the action was dismissed on the ground that the deed was made on the assumption that all the persons named as parties would execute it, and as one of them had not executed it, it was not binding upon the others, though they had executed it.

In the present case it is true Tom Morton is not named as a party in the deed, but he is so referred to therein as to make it plain that the deed was made upon the supposition that if living he would ultimately concur in the intended arrangement.

(1) (1849) 16 Sim. 590.

(2) (1865) 34 Beav. 180.

The deed contains no express proviso, and I cannot find anything in it which raises an implication that the general rule applicable to a transaction in the nature of a family arrangement is not to apply to this case, and in my opinion the case falls within the principles laid down in the cases I have referred to. I must answer the first question in the negative; the costs may be retained and paid out of the shares of residue to which the parties to the summons are entitled.

Solicitors: *Milner & Bickford, for Stabler, Kesteven & Co., Sheffield.*

H. L. L.

FALCONER v. STEARN.

[1930. F. 158.]

CLAUSON
J.

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Nov. 4;
Dec. 15, 16,
17.

Education—Non-provided School—Foundation Managers—Board of Education—Power of Board to make Orders as to Appointment of Managers—Limitations on Power—Provisions of Trust Deed Inconsistent with Provisions of Act, or Insufficient or Inapplicable for Purpose—Power of Board to Amend Order—Not Subject to same Limitations—Education Act, 1902 (2 Edw. 7, c. 42), s. 6, sub-s. 2; s. 11, sub-ss. 1, 8—Education Act, 1921 (11 & 12 Geo. 5, c. 51), ss. 162, 172—Certificate of Board of Education authorizing Proceedings—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 17.

By a deed made in 1860, pursuant to the School Sites Acts, 1841 and 1844, a site was conveyed to B., L., and T., the then vicar and churchwardens of the parish church of Old Newton and their respective successors in trust for the erection of a school for the poorer classes of that parish; the school and the endowments to be controlled and managed by the vicar and churchwardens for the time being of the parish.

By s. 6, sub-s. 2, of the Education Act, 1902: "all public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four, appointed as provided by this Act."

By s. 11, sub-s. 1, of the Education Act, 1902, it is provided that the foundation managers of a school should be the managers appointed under the provisions of the trust deed; but if it should be shown to the satisfaction of the Board of Education that the provisions as to the appointment of managers were in any respect "inconsistent with the provisions of this Act, or insufficient or inapplicable for the purpose," the Board might make an order under that sub-section for the purpose

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of meeting the case: and by sub-s. 2 such order, where it modified the trust deed, was to have effect as part of the trust deed: and by sub-s. 8 the Board might, on the application of (among others) the local education authority, revoke, vary or amend any order made under sub-s. 1; the draft of such order to be laid before each of the Houses of Parliament, and if either House should resolve that the draft should not be proceeded with, no further proceedings should be taken thereon.

By an order made by the Board in 1903 under sub-s. 1, it was provided that there should be four foundation managers of the Church of England school in the parish of Old Newton, of which the plaintiff was the vicar—namely, an ex-officio manager who should be the vicar, a second manager to be nominated by him, a third to be appointed by the managers, and a fourth or representative manager to be elected by the vestry of the parish.

By an amending order made by the Board in 1922, under sub-s. 8, upon the application of the local education authority (a draft whereof was laid before each House of Parliament and in each of which a motion that that order should not be proceeded with was negatived), the order of 1903 was amended by providing that the foundation managers should consist of an ex-officio manager, who should be the people's churchwarden, and three other managers to be appointed by the Archdeacon.

The first four defendants having, in pursuance of the provisions of the amending order of 1922, been appointed managers of the school, with the result that the plaintiff was removed from his office as manager, the plaintiff brought this action in which, after alleging that the order of 1922 was ultra vires and void, he claimed a declaration that, by virtue of the original order of 1903, he, the plaintiff, as vicar of the parish, was the ex-officio manager of the school; for an injunction restraining those defendants from excluding him from meetings of managers or from interfering with him in the exercise of his powers as manager, and for damages.

Upon the trial of the action the defendants raised a preliminary objection that the plaintiff ought to have obtained the authority of the Board of Education (under s. 17 of the Charitable Trusts Act, 1853, and Orders in Council made under s. 2, sub-s. 2, of the Board of Education Act, 1899) to proceed with the action:—

Held, that (the plaintiff declining the leave of the Court to strike out his claim for the injunction) his claim for equitable relief by way of injunction, whether ancillary or not to his common law claim for damages, involved the question whether, if the plaintiff were excluded, the trusts of the school would be properly administered, and therefore was a claim for "relief, order or direction concerning or relating to a charity, or the estate, funds, property, or income thereof," within the meaning of the Charitable Trusts Act, 1853. Accordingly the proceedings in the action were stayed until the authority of the Board was obtained.

Upon the action again coming on for trial, after the certificate of the Board's authority to proceed with it had been obtained:—

Held, that upon the proper construction of sub-s. 8 of s. 11 of the Education Act, 1902, the power by that sub-section conferred upon the

Board of Education to make orders revoking, varying or amending any order made under sub-s. 1 of s. 11 is free from the conditions specified in sub-s. 1, subject to which alone the Board have power to make orders under that sub-section. Accordingly, the amending order of 1922 was *intra vires* and the action failed.

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By a deed dated February 14, 1860, John Gurdon Rebow, under the powers and authority of the School Sites Acts, 1841 and 1844, voluntarily granted unto Rev. W. H. Bull, the vicar of the parish of Old Newton in the County of Suffolk, and Wm. Lankester and John Turner, the churchwardens of the parish, the piece of land or site therein described with the school-house thereon, to the use of the said W. H. Bull, W. Lankester, and J. Turner and their respective successors, the vicar and churchwardens of the parish for the time being for ever for the purposes of those Acts, upon trust to permit the site and buildings thereon to be used as and for a school for the education of children and adults or children only of the labouring and other poorer classes in the parish and otherwise for the purposes of the education of such poor persons in religious and useful knowledge and for no other purpose; and it was thereby declared that such school and the funds and endowments thereof should be controlled and managed in manner following: the vicar and churchwardens being churchmen for the time being of the parish should have the superintendence of the religious and moral instruction of the scholars and might use the premises for the purposes of a Sunday-school under their exclusive control and management and in all other respects the control and management of the school and premises and of the funds and endowments thereof should be vested in and exercised by the vicar and churchwardens being churchmen for the time being of the parish.

By s. 6, sub-s. 2, of the Education Act, 1902, it was provided as follows: "All public elementary schools not provided by the local education authority shall, in place of the existing managers, have a body of managers consisting of a number of foundation managers not exceeding four, appointed as provided by this Act."

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By a final order dated August 22, 1903 (which came into force on August 30, 1903), and made by the Board of Education under s. 11, sub-s. 1, of the Education Act, 1902 (1), after reciting that an application had been made to the Board by the managers of the school for an order appointing foundation managers of the school, it was ordered that on and after September 1, 1903, there should be four foundation managers who should consist of an ex-officio manager who should be the principal officiating minister of the parish, a second to be nominated by him, a third or co-optative manager to be appointed by the foundation managers, and a fourth or representative manager to be elected by the vestry of the parish.

By an order dated May 12, 1922, and made by the Board of Education under s. 11, sub-s. 8, of the Act of 1902 (2), upon the application of the local education authority, the order of 1903 was amended in the following respects: that the foundation managers should consist of an ex-officio manager, who should be the people's churchwarden for the time being of the parish, and three other "nominated managers"

(1) Sect. 11, sub-s. 1: "The foundation managers of a school shall be managers appointed under the provisions of the trust deed of the school; but, if it is shown to the satisfaction of the Board of Education that the provisions of the trust deed as to the appointment of managers are in any respect inconsistent with the provisions of this Act, or insufficient or inapplicable for the purpose, or that there is no such trust deed available, the Board of Education shall make an order under this section for the purpose of meeting the case."

Sub-s. 2: "Any such order may be made on the application of the existing owners, trustees or managers of the school . . . and any such order, where it modifies the trust deed, shall have effect as part of the trust deed, and where there is no trust deed, shall

have effect as if it were contained in a trust deed."

(2) Sect. 11, sub-s. 8: "The Board of Education may, on the application of the managers of the school, the local education authority or any person appearing to them to be interested in the school, revoke, vary or amend any order made under this section by an order made in a similar manner; but, before making any such order, the draft thereof shall, as soon as may be, be laid before each House of Parliament; and, if within thirty days, being days on which Parliament has sat, after the draft has been so laid before Parliament, either House resolves that the draft, or any part thereof, should not be proceeded with, no further proceedings shall be taken thereon, without prejudice to the making of any new draft order."

to be appointed by the Archdeacon of Suffolk, whose term of office should be three years and who should remain in office until his successor was appointed. And by that amending order it was provided that the terms of office of the managers appointed under the order of 1903 should cease at the expiration of fourteen days from the date of the amending order.

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The draft of the order of 1922 was, in accordance with the requirement of sub-s. 8, laid before each House of Parliament, in each of which a motion that the order should not be proceeded with was negatived: see (1922) 151 H. C. Deb., p. 2142, and 49 H. L. Deb., p. 975.

The first four defendants, F. W. Stearn, E. H. Baker, and P. Woodward, claimed that, in pursuance of that order, they were appointed by the Archdeacon to be the "nominated" managers, and the defendant P. Edwards likewise claimed to have been appointed a manager by his three co-defendants in the place of the people's churchwarden, who had declined the office of manager, with the result that the plaintiff was removed from his office as manager.

The plaintiff accordingly brought this action alleging that the order of 1922 was ultra vires and void, and claiming (1.) a declaration that he, as vicar of the parish, was by virtue of the order of 1903 the ex-officio foundation manager of the school; (2.) an injunction to restrain the first four defendants and each of them from excluding the plaintiff from any meeting of the managers or from otherwise interfering with him in the exercise of the powers in relation to management conferred upon him by the order of 1903; and (3.) an injunction to restrain those defendants from acting or purporting to act as managers of the school, until validly appointed.

It appeared that by letters dated November 25, 1920, and April 18, 1921, the Board of Education called upon the plaintiff to summon a meeting of the vestry for the purpose of electing a representative manager.

The plaintiff alleged that, in spite of his having complied with that request of the Board by summoning a vestry meeting, which was held on January 26, 1922, and at which

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 J. with the order of 1903, yet the amending order of 1922 was,
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By para. 14 of his statement of claim the plaintiff alleged as follows: (i.) There was no evidence before the Board of Education that the provisions with regard to the appointment of managers of the school contained in the trust deed of 1860 as modified by the order of 1903 were in any respect inconsistent with the provisions of the Education Act, 1902, or insufficient or inapplicable for the purpose of such appointment. (ii.) Further, or in the alternative, that the Board of Education purported to do by the order of 1922 what it could not have done by the order of 1903, which could only be made for the purpose of meeting a special case—namely, the case of the provisions of the trust deed as to the appointment of managers being in any respect inconsistent with the said Act or insufficient or inapplicable for the purpose aforesaid. (iii.) Further, or in the alternative, that the order of 1922 was in effect made for the purpose of doing indirectly what the said Act gives no power to do directly—namely, for the purpose of removing the plaintiff from his position as ex-officio foundation manager of the school. (iv.) Further, or in the alternative, that the order of 1922 was an unnecessary and unjustifiable disturbance of the scheme of management of the school contemplated by the trust deed and disregarded the requirements of sub-s. 4 of s. 11. (1) (v.) Generally, that in making the order of 1922 the Board of Education was wrong in law. And the plaintiff claimed that that order was ultra vires and void, so that the order of 1903 in its original form was at all material times in force, and the appointment of the first four named defendants purported to have been made under the order of 1922 was invalid.

(1) Sect. 11, sub-s. 4: "In making an order under this section with regard to any school, the Board of Education shall have regard to the ownership of the school building and to the principles on which the education given in the school has been conducted in the past."

Those defendants by their defence alleged that the plaintiff by a letter of April 23, 1921, declined to summon a vestry meeting, as requested by the Board of Education; and claimed that, having regard to the provisions of the order of 1922, the plaintiff ceased to be the ex-officio manager of the school and that they themselves were validly appointed as managers under that order. They further pleaded that the plaintiff had not obtained or applied for any order or certificate of the Board of Education which they submitted was required by s. 17 of the Charitable Trusts Act, 1853, the Board of Education Act, 1899, and the relevant Orders in Council made thereunder to enable the plaintiff to proceed with his action.

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The Attorney-General, who was added as a defendant by order made on May 27, 1930, delivered a defence in which he stated that he applied to be added as a defendant in order, on behalf of His Majesty, to assist the Court with regard to the matters in issue in the action, and to preserve the rights and interests of the charity and of the public in relation to those matters.

The action came on for trial before Clauson J. on November 4, 1931.

Cleveland-Stevens K.C. and *F. R. Evershed* for the defendants. We take the preliminary objection that the plaintiff has not obtained or applied for an order or certificate of the Board of Education authorizing the commencement of the action as required by s. 17 of the Charitable Trusts Act, 1853. This action is not merely to prevent the plaintiff from being excluded from his office of manager of the school; but it involves questions relating to the administration of the trusts of the school and is a "proceeding" within the meaning of s. 17, in that the object is to have it declared that, according to the trusts, the plaintiff is still the ex-officio manager of the school. In *Glen v. Gregg* (1) the certificate under s. 17 was not required, because under s. 9 of the Places of Religious Worship Registration Act, 1855, the particular charity was

(1) (1882) 21 Ch. D. 513.

CLAUSON J. wholly exempted from the provisions of the Charitable Trusts Act, 1853.

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[The Court then gave leave to the plaintiff—defendants not opposing—to amend his pleadings by striking out the first claim in his statement of claim, for a declaration, and the third claim, for the second injunction; but the plaintiff declined the offer made of leave to strike out also the second claim—namely, for the first injunction.]

Norman Daynes K.C. and *E. Blanshard Stamp* for the plaintiff. This action does not fall within s. 17, and therefore the certificate is unnecessary. The relief sought by the plaintiff does not relate to any property of the school, nor involve a consideration of the trusts of the school. The object of s. 17 was to prevent strangers from coming in as relators to complain of the management of a charity, unless the Charity Commissioners were satisfied that proceedings ought to be taken. It was not the intention of the legislature to interfere with actions at law. The plaintiff is only seeking to enforce his common law right not to be ejected from his managership and deprived of his right of attending managers' meetings, a right which he is entitled to have protected by injunction: *Richardson v. Methley School Board*. (1) Such a claim may involve a consideration of the trusts of the school; whether the defendants who seek to oust the plaintiff were really properly appointed; but such questions arising incidentally are not sufficient to bring this case within the section: *Holme v. Guy* (2); *Rendall v. Blair*. (3) Even if the certificate of the Board should be held to be necessary, the action should be allowed to stand over to give the plaintiff an opportunity to obtain the certificate: *Rendall v. Blair*. (3)

CLAUSON J. I need not trouble you, Mr. Cleveland-Stevens.

In this action the Reverend Edward George Falconer, who is the vicar of the parish of Old Newton in the County of Suffolk, is suing four gentlemen who are acting, or pretending to act, as the managers of a non-provided school in that

(1) [1893] 3 Ch. 510.

(2) (1877) 5 Ch. D. 901.

(3) (1890) 45 Ch. D. 139.

parish, for a declaration that under and by virtue of a certain order of the Board of Education the plaintiff is an ex-officio manager of the school in question, and is entitled to have notice of and to attend and vote at all meetings of the managers of the school and otherwise to exercise all powers in relation to the management of the school conferred upon him by the order in question, which is dated 1903. He also seeks an injunction to restrain those gentlemen from excluding or seeking to exclude him from any meetings of the managers of the school or from otherwise interfering with or hindering him in the exercise of the powers in relation to the management of the school conferred upon him by that order of the Board of Education. He also seeks an injunction to restrain those gentlemen from acting or purporting to act as managers or manager of the school until validly appointed to be such managers or manager, and then he claims damages, costs, and further and other relief.

The Attorney-General has been added as a defendant to the action since the writ was issued and the statement of claim delivered. On perusing the statement of claim it would appear that the real point is whether, although, by virtue of the 1903 order and the trust instrument relating to the school, the plaintiff was an ex-officio foundation manager, the order which the Board of Education made in 1922 had the effect, as it has been contended, of causing the plaintiff to cease to be an ex-officio foundation manager. I gather that what the plaintiff desires to have decided is whether or not there is any invalidity in that second or 1922 order of the Board of Education. But what I have in the first place to consider is this preliminary point, whether, having regard to s. 17 of the Charitable Trusts Act of 1853, it is or it is not my duty to stay the proceedings in this action until a certificate of the Board of Education is obtained permitting the action to proceed.

Now s. 17 of that Act provided, generally speaking, that certain proceedings connected with charities should not proceed in this Court without the certificate of the Charity Commissioners; and it is admitted that, having regard to modern legislation with regard to educational charities,

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which is the kind of charity with which this matter is concerned, the Board of Education has been substituted for the Charity Commissioners. It is not necessary for me to read the section at length, nor, having regard to the number of decided cases which appear in the books on the subject, is it necessary for me to make any general observations on the section. It is enough for me to say that I must, as I am asked by the defendants to do, stop all further proceedings in this action until the Board of Education certificate permitting them to proceed has been obtained, if I am satisfied that this proceeding is one "for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof."

Now in the course of the discussion, counsel for the plaintiff has asked for leave which, without any opposition on the part of the defendants, I have given, to amend the statement of claim, and the writ, by striking out the claim No. 1, the claim for the declaration, and also claim No. 3, the claim for the second injunction. The first claim is for a declaration that the plaintiff was entitled to have notice of and to attend and vote at all meetings of the managers of the school. The third claim is for an injunction to restrain the defendants from acting or purporting to act as managers of the school. I think in the course of counsel's argument I intimated the view that I take—namely, that so long as those two claims were present it was almost impossible to contend that the proceeding did not relate, so far at all events as those claims were concerned, to the obtaining of "relief or order concerning or relating to the charity." It seems to me plain that the first declaration in substance involved an assertion that the charity could not be properly administered without the plaintiff's presence. With regard to the third claim, the injunction, it seems to me to involve the suggestion that, so long as the defendants are taking or seeking to take part in the administration of the charity, the charity is being illegally administered. I think it is quite plain that, if those two claims had remained, I should have had no other course open to me except to stay proceedings in this case.

There is still standing a claim against the defendants for damages. It was suggested that that is a claim which, of itself, would not render the action obnoxious to s. 17. It is suggested that there is a common law right in a trustee to sue for damages a co-trustee who interferes with his taking part in the administration of a trust, or a person who, not being properly a co-trustee, interferes with him. It is a question of some interest, but as to which I do not propose to either form or express any opinion, because I have to deal with an action which is not confined to that claim for damages, but includes also a claim for an injunction to restrain the defendants from excluding or seeking to exclude the plaintiff from any meeting or meetings of the managers of the school or from otherwise interfering with or hindering the plaintiff in the exercise of the powers in relation to the management of the school conferred upon him, and claimed by him as a manager. Having regard to the fact that the plaintiff has elected to amend his statement of claim only to the extent I have stated, and, notwithstanding every opportunity I gave him, did not see his way to amend by striking out the second claim—namely, the claim for the first injunction—I must take it that that second claim is a substantial part of the action.

Now it is suggested that, if the plaintiff has a common law right of action for damages, to ask for an injunction by way of supplementing that claim and making it effective by restraining the future doing of such acts as those which have given rise to the claim for damages, would be a claim of such a character that it would not be hit by s. 17. But I conceive that what I have to look at is the substance of the thing. Now the injunction which is sought—whether a right to it is ancillary or not to the claim for damages—is in substance directed to establishing that, whilst the plaintiff is excluded from the meetings of the managers, the trust is not being properly administered, and that those who prevent him taking part in the administration of the trust are taking a step which is inconsistent with the due and proper administration of the trust. The relief

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asked by way of injunction is, of course, relief which, apart from the Judicature Acts, could only be claimed in a Court of Equity, and it is not, in my view, simple equitable relief which would follow naturally and plainly from a claim to damages. But, anyway, whether it be so or not, it seems to me plainly to be equitable relief which comes within the expression "relief, order, or direction concerning the charity." If the injunction is granted its operation must necessarily be to regulate or interfere with the administration of the charity. It seems to me plain that, so long as that claim remains standing, the action is one which is obnoxious to s. 17. I shall therefore make an order staying all proceedings in this action, unless and until a certificate shall be obtained from the Board of Education authorizing its further prosecution.

On December 15, 1931, the certificate of the Board of Education having in the meantime been obtained which gave the plaintiff authority to proceed, the action came on again for trial before Clauson J.

The plaintiff, who was called as a witness, gave evidence as to the causes of the delay in summoning a vestry meeting for the election of a representative manager as required by the Board of Education—namely, a breakdown in health at the time of the Board's request and the frequent disputes and hostile feeling shown by some of the defendants to the plaintiff at meetings of the managers which deterred him from calling the meeting of the vestry—all which causes he alleged he explained to the Board.

Norman Daynes K.C. and *E. Blanshard Stamp* for the plaintiff. Upon the proper construction of sub-s. 8 of s. 11 of the Act of 1902, an amending order can only be made if the same conditions are observed as those stated in sub-s. 1, under which the Board of Education are empowered to make an original order under that sub-section. There is here no evidence that it was shown to the satisfaction of the Board that the provisions in the trust deed as to the appointment of managers were inconsistent with the provisions of the

Act or that they were insufficient or inapplicable for the purpose. CLAUSON
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There was no constitutional difficulty to be dealt with when the amending order of 1922 was made. It simply had the effect of removing the plaintiff from his office of manager of the school to which he had been duly appointed under sub-s. 1. The order of 1903 under which he was appointed must be read as part of the trust deed: sub-s. 2 of s. 11. It was but convenient that the Board should have power by sub-s. 8 to revoke, vary or amend original orders made under the authority of sub-s. 1, in view of changes in circumstances, but the power was not an unfettered one; it was only exercisable under the conditions stated in sub-s. 1, and subject to the control of Parliament. And it must be shown that the Board were satisfied as to the inconsistency, insufficiency or inapplicability referred to in sub-s. 1 upon grounds which would reasonably lead the Board to the conclusion to which they in fact came: *Duke of Beaufort v. Crawshay*. (1)

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Cleveland-Stevens K.C. and *F. R. Evershed* for the first four defendants, Stearn, Baker, Woodward and Edwards. First, on the question of construction: The two sub-ss. 1 and 8 are not in *pari materia*. When it comes to revoking, varying or amending an order the Board are no longer bound by the provisions of sub-s. 1. The exercise of the Board's discretion, within the limits of s. 11, is safeguarded by the requirement that the draft order should be laid before each House of Parliament. If, however, the plaintiff's construction is correct and an amending order must conform to the same conditions as an original order under sub-s. 1, the original order had in fact broken down and thus proved insufficient.

Secondly, the draft of the order of 1922 having been laid before Parliament and motions that it should not be proceeded with having been negatived, that order has statutory authority and its validity cannot be questioned. In *Dale's Case* (2) rules and orders made under s. 19 of the Public Worship Regulation Act, 1874, having been laid before Parliament in manner required by that Act, Brett L.J., in

(1) (1866) L. R. 1 C. P. 699.

(2) (1881) 6 Q. B. D. 376.

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the course of his judgment, said (1): "I am of opinion that the rules and orders have statutory authority, for not only is the authority given to certain persons by statute to draw them up, but it is provided that they shall be laid before Parliament for a certain time, and if not objected to they are then to be binding. Wherever that provision is introduced into an Act of Parliament it seems to me that the rules and orders, if not objected to by Parliament, become part of the statute": see also *Ex parte Foreman*. (2) In *Institute of Patent Agents v. Lockwood* (3) it was held that rules regulating the practice of registration made under the Patents, Designs and Trade Marks Act, 1883, and which in pursuance of the requirements of that Act were laid before Parliament and not annulled, were of statutory authority, and that it was not competent for the Court to consider the question whether they were intra or ultra vires. That Act enacted, in effect, that such rules should be of the same effect as if contained in the Act; but both Lord Herschell L.C. and Lord Watson treated the requirement of laying the regulations before Parliament as the important consideration. In *Minister of Health v. The King (on the Prosecution of Yaffe)* (4) there was no provision for laying the scheme before Parliament, as there was in respect of the registration rules in *Institute of Patent Agents v. Lockwood* (3), and it is therefore not a decision on the present point.

The plaintiff's contention would, in Lord Watson's words in *Lockwood's* case (5), "make it competent for the Court to inquire at its own hand whether or not the Board had kept within the statute although the Legislature had declined to interfere."

Thirdly, it is too late to impugn the validity of the order, having regard to s. 162 of the Education Act, 1921. (6)

(1) (1881) 6 Q. B. D. 455.

(2) (1887) 18 Q. B. D. 393.

(3) [1894] A. C. 347.

(4) [1931] A. C. 494.

(5) [1894] A. C. 364.

(6) Sect. 162: "After the expiration of three months from the date of any order or requisition of the

Board of Education under this Act, or any enactment repealed by this Act, that order or requisition shall be presumed to have been duly made, and to be within the powers of this Act, and no objection to the legality thereof shall be entertained in any legal proceeding whatever."

That section applies to the order of 1922 made under the Act of 1902 which was repealed by the Act of 1921.

Stafford Crossman for the Attorney-General supported the last argument.

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Stamp in reply. The plea now raised by the defendants at the hearing that, in accordance with s. 162 of the Education Act, 1921, it is too late to question the validity of the order of 1922, ought to have been pleaded in the defence: Order XIX., r. 15; that rule is silent as to the consequence of the omission to plead the statute. It leaves the defendants in mercy and does not preclude the Court from deciding the matter in issue: *In re Robinson's Settlement* (1); *Gregory v. Torquay Corporation*. (2) Even if the defendants are right in their contention that the Board can do by an amending order what they cannot do by an original order, they cannot escape from the first sentence of sub-s. 1 of s. 11, which requires that the managers shall be the managers appointed by the trust deed. That provision is paramount. If the order was invalid, it cannot be made valid under s. 162 merely on the ground that the order has stood for three months before any objection was raised against its legality by the plaintiff: *The Queen v. Sankey*. (3) It cannot be that s. 162 has the effect of making it incompetent for the Court to decide upon the validity of the order, if the objection to its validity is not raised within three months from its date; if the validity of the order cannot now be questioned there arises an inconsistency between the Act and the order, and the Court must decide between the conflicting provisions: per Viscount Dunedin in *Minister of Health v. The King (on the Prosecution of Yaffe)*. (4) The dominant provision is that the managers shall be the managers appointed by the trust deed.

CLAUSON J. [stated the material facts, and continued:] I do not propose to refer to the circumstances stated in the statement of claim, which led up to the making of the amending order of 1922, because they do not seem to me to

(1) [1912] 1 Ch. 717.

(2) [1912] 1 K. B. 442.

(3) (1878) 3 Q. B. D. 379, 384.

(4) [1931] A. C. 494, 503.

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be relevant to the point which I have to decide. That order may or may not, as a matter of policy, have been a proper order to make, but of that, in my view, the Board of Education is made by the legislature the judge, subject, of course, to the power of either House of Parliament, under sub-s. 8 which I have read, to interfere with the order coming into force.

If the making of the order was, upon a proper construction of the sections with which I have to deal, within the powers of the Board of Education, it appears to me that I am not concerned with the reasons which led the Board of Education to make the order.

On the literal reading of sub-s. 8 of s. 11 of the Education Act, 1902, it would appear that the Board of Education have unfettered power to revoke, vary or amend the 1903 order or any other order as to the appointment of managers which they may choose to make under sub-s. 1, subject only to the restriction that either House of Parliament may object to the draft order being proceeded with. But the case, as it was put before me on behalf of the plaintiff, was based on an argument which I hope I shall accurately represent as being the following: It was said that under sub-s. 2 of s. 11 the 1903 order where it modifies the trust deed, as that order unquestionably does, is to have effect as part of the trust deed. Reading sub-s. 1, it is quite plain that the Board could not make an order revoking, varying, or modifying the trust deed, except under the conditions stated in the first sub-section—namely, that it be shown to the satisfaction of the Board of Education that the provisions of the trust deed as to the appointment of the managers are in some way inconsistent with the provisions of the Act, or insufficient or inapplicable for the purposes of such trust deed. Then it is said: The power to vary the first order can, upon the fair construction of sub-s. 8, be exercised only if it is shown to the satisfaction of the Board of Education that the provisions of the trust deed, as to the appointment of managers, as varied or amended by an order made under sub-s. 8, are inconsistent with the provisions of the Act or

insufficient or inapplicable for the purpose; and it was suggested that none of those circumstances could exist, because in the provisions of the trust deed as varied by the amending order of 1922 there was nothing inconsistent with the provisions of the Act, and nothing insufficient or inapplicable for the purpose. Therefore the Board of Education cannot have been satisfied as to the existence of any of those circumstances which are stated in sub-s. 1, since none of such circumstances have been shown to exist. On studying sub-s. 8 with some care, it appears to me that the argument is founded on a misapprehension of the scope and meaning of the various sub-sections. The first sub-section is devoted to enabling provisions to be made for the appointment of managers in such a way as to accord with the Act, and power for that purpose is given to the Board of Education which they can exercise only if certain things are proved to their satisfaction. As I have already said, in the present case the plaintiff bases his case on the 1903 order; and, accordingly, it is not open to me to question the validity of that order, even if there were any ground for doing so. Now it is plain that under sub-s. 1 an order can only be made, if the conditions therein stated are observed; and it is true that by sub-s. 2 the modifying order is to have effect as part of the trust deed; in other words, in considering whether or not the trust is being properly administered, regard must be had, not only to the trust deed, but to the order which is treated as embodied in it. Now when I come to sub-s. 8 the power to vary is loaded by no conditions; there is no condition precedent that the Board must be satisfied about anything, it is simply a power to vary, and it seems to me clear, upon consideration, that it would be very unsatisfactory if that power were fettered, certainly if it were fettered by the necessity of showing the existence of such circumstances as those that are stated in the first sub-section. Some of those circumstances could not exist in the case of a possible amending order. It would be, I might almost say, impossible that the trust deed as varied by the order, varied for the special purpose of bringing it

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into harmony with the Act, should be, as so varied, inconsistent with the Act. It is most unlikely that the trust deed, as varied for the special purpose of making the proper provisions applicable to the circumstances, should be inapplicable for the purpose. Insufficient, of course, it might be, because the trust deed as varied might no doubt turn out to be insufficient to meet changed circumstances. But setting aside the word "insufficient," the other conditions indicated by sub-s. 1 would be wholly inapplicable, and it would be almost absurd to apply them to a varying order made under sub-s. 8. It seems to me plain that it was intended to leave the Board of Education with the fullest power to vary that which they themselves had put into the trust deed; for not only do even such public bodies as the Board of Education sometimes make a mistake which they may desire to correct, but, what I think is much more to the point, circumstances alter, and it may be most important to vary such provisions as to the appointment of managers. It may become desirable to make an alteration in the mode of election of a representative trustee: or it may become desirable, having regard to change of circumstances, to make an alteration as regards the ex-officio trustee. I suggested in the course of the argument some such case as this: where you have two livings amalgamated with one incumbent for the amalgamated living, but there is a curate living in an outlying part of the amalgamated parishes, it may be convenient that the curate should become ex-officio manager of the school in that part of the parish in which he dwells. One can imagine all sorts of circumstances where the absence of a power of variation would be most inconvenient. I see no reason to doubt that sub-s. 8 means exactly what it says, that any variation or amendment may be made by the Board of Education in the provisions as to appointment of managers; variation or amendment, of course, in regard to the appointment of managers. That that is the meaning of sub-s. 8 seems to me to be supported by the fact that in this case there is added a safeguard which it will be observed did not exist in the case of orders made under the

first sub-section; a varying or amending order made under sub-s. 8 is subject to the control of either House of Parliament. Accordingly, on the construction of this sub-section, it appears to me that the order which was made in 1922 by the Board of Education is authorized in the most precise way by the terms of that sub-section and there is nothing in any respect ultra vires about it.

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Now let me read from the statement of claim what the plaintiff says about it and see how far his criticisms are met, if the construction which I place upon sub-s. 8 is the correct one. Para. 14, sub-para. (i.), of the statement of claim says this: [His Lordship then read that sub-paragraph, and continued:] That, of course, is stating the contention—which I hope I stated fairly—which appears to me an erroneous contention on the construction of sub-s. 8. The second point made is in these terms: [His Lordship then read sub-para. (ii.), and continued:] I am not quite sure that I follow exactly what that means, but I confess I cannot see that there could have been any difficulty in the Board of Education making in 1903 just such an order as the 1903 order as amended by the 1922 order now amounts to. I see no reason why they should not, in order to bring the trust deed in line, so to speak, with the Act, have made provision for the four foundation managers, which is the maximum number allowed by the Act. It is obvious that as other managers are introduced from outside, if I may use the expression, by appointment of the local authority, it would in most cases be desirable to have the maximum number of foundation managers. It happens that they chose as the ex-officio manager in 1903, the vicar, but I do not see why they should not have chosen one of the churchwardens. After all, the managers under the trust deed were the vicar and the two churchwardens, and I cannot conceive that, having regard to sub-s. 1 of s. 11, the Board of Education was so tied down as to be bound in making provisions for the appointment of managers to retain the vicar and both churchwardens as ex-officio managers. The third point made

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is in these terms : [His Lordship then read sub-para. (iii.), and continued :] My only observation as to that is that no doubt the order has had the effect of removing the plaintiff from being an ex-officio manager. If the order be one which is justified under sub-s. 8 it is impossible for me to say it is ultra vires. The real objection of the plaintiff to the amending order of 1922 is that it was bad policy or improper or undesirable that the principal officiating minister should not be an ex-officio manager, but that, as I say, in my view, is quite plainly a question for the Board of Education, subject—as they are subject in this matter by reason of sub-s. 8—to the control of either House of Parliament. Then the fourth point is : [Here his Lordship read sub-para. (iv.), and continued :] That has reference to sub-s. 4 of s. 11, which runs thus : “ In making an order under this section with regard to any school, the Board of Education shall have regard to the ownership of the school building and to the principles on which the education given in the school has been conducted in the past.” I have nothing before me in any shape or form to suggest that the Board of Education have failed to take into their consideration the matters referred to in sub-s. 4. It is perfectly true, as the correspondence has shown, that the circumstance which finally determined the Board of Education in making the order they made, was the difficulty which in their view had been introduced into the administration of the school by the failure of the vicar to arrange for the vestry meeting to appoint a representative manager in the proper way. But I have no evidence whatever to suggest, and I have no reason to suppose it to be the case, that the Board of Education, in making the order of 1922, overlooked sub-s. 4 or failed to give the proper consideration to the matters mentioned in it. The fifth point is : “ Generally, that in making the amending order of 1922, the Board of Education was wrong in law.” In my view, the whole matter is a question of the construction of s. 11, and, if I am right in the construction I place on that section, the action must fail. It is common ground that if the order is a good one it must be

held that the defendants are the managers and the plaintiff has no right. CLAUSON
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I should, however, add this. Late in the argument my attention was called to s. 162 of the Education Act of 1921, which makes this provision: "After the expiration of three months from the date of any order or requisition of the Board of Education under this Act, or any enactment repealed by this Act"—and I should mention that the Act of 1902, the provision of which I have stated, was repealed by the Act of 1921—"that order or requisition shall be presumed to have been duly made, and to be within the powers of this Act, and no objection to the legality thereof shall be entertained in any legal proceeding whatever." I may say that the provisions with which I have dealt in the 1902 Act are in substance, I think, perhaps even actually (save for some slight verbal alterations), reproduced in the Act of 1921. When this section was first read to me the criticism occurred to my mind that it says that "orders made under this Act or any enactment repealed by this Act" are to be within the powers of this Act, and that that might not assist me to say whether they were within the Act which was in force at the time the orders were made. But the answer to that curious little conundrum is, I think, to be found in this, that the repealing section (s. 172) contains provisions which appear to have the effect that any order made under an earlier Act (which would include the order of 1922) should, so far as it could have been made or granted under the Act of 1921, have effect, as if made or granted under this Act, and so, for all practical purposes, s. 162 is equivalent to saying that an order shall be presumed to be within the powers of the Act of 1921 or the Act under which it is made. In the view I take of the construction of the section under which the Board of Education acted, it is not necessary that I should express any view as to the operation of s. 162 or as to whether that section is an absolute answer to the institution of this action, and, as the discussion of that matter raises a point of some considerable difficulty, I do not propose to say anything more about that. The action fails and must be dismissed with costs, including

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CLAUSON J. therein the costs of the first hearing which were to be dealt with by the judge at this trial.

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Solicitors: *Kenneth Brown, Baker, Baker; Sharpe, Pritchard & Co., for Cobbold, Sons & Menneer, Ipswich; Treasury Solicitor.*

H. C. H.

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In re DAVIES' WILL TRUSTS.

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Nov. 4, 5.

BEVAN v. WILLIAMS.

[1931. D. 593.]

Will—Settlement made before 1926—Farm and Lands—Share of Income to one of several Tenants for Life for “so long as he shall reside upon and assist in the management of” Farm—Farm and Lands subject after 1925 to Statutory Trusts—Interest of that Tenant for Life not forfeited by exercise of Statutory Trusts—Settled Land Act, 1925 (15 Geo. 5, c. 18), s. 106—Law of Property Act, 1925 (15 Geo. 5, c. 20), ss. 26, sub-s. 3; 28, sub-ss. 1, 2; 35; 39; Sch. I., Part IV., para. 1 (1.)—Law of Property (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 11), s. 7; Schedule.

A testator died in 1922, having by his will made in 1915 directed (inter alia) that the plaintiff should pay the net income of his freehold farm and lands and of his share of minerals thereunder equally between herself and his nephew until the testator's youngest or only daughter should attain the age of twenty-one and thereafter between herself for life or until marriage, the nephew for life “or so long as he shall reside upon and assist in the management of my said farm,” and the testator's two daughters for their lives and the survivor of them for her life. Subject thereto the testator devised the farm and lands to the children of his daughters as in the will mentioned. The testator's nephew lived with him at the farm, and assisted in its management until the testator's death, after which he continued to live there and to manage it. Accordingly, upon the coming into force of the Law of Property Act, 1925, the property vested in the plaintiff upon the statutory trusts. On a summons taken out by the plaintiff in 1931 and asking (inter alia) whether, upon a sale of the farm and lands under the statutory trusts, or upon the exercise by her of any power of leasing conferred on her by statute or by the will, and in particular upon the exercise of any such power in favour of the testator's nephew, his interest in the income would determine:—

Held, that upon the true construction of s. 35 of the Law of Property Act, 1925, the nephew's life interest would not be forfeited upon any exercise in his lifetime of the statutory trusts.

ADJOURNED SUMMONS.

By his will dated February 25, 1915, David John Davies (hereinafter called "the testator") appointed the plaintiff, Harriet Gwen Bevan, executrix and trustee thereof for the purposes of the Settled Land Acts, 1882 to 1890, and after various bequests devised his freehold farm, his lands adjoining it, and his share in the minerals under the farm to the plaintiff upon trust to pay the net income thereof equally between herself and his nephew, William Stanley Williams, until the testator's youngest or only daughter should attain the age of twenty-one, subject to the plaintiff's and the nephew's educating the testator's two daughters and the survivor of them during that period, and thereafter upon trust to pay it in equal shares to herself for life or until marriage, the nephew for life or so long as he should reside upon or assist in the management of the farm, and the testator's two daughters and the survivor of them during their lives and the life of the survivor of them. Subject to these provisions the testator devised the farm and lands to the children of his daughters as in the will mentioned.

The testator died in 1922 entitled in fee simple to the surface of the farm and lands and to one equal fourth part of the minerals thereunder. For many years before the testator's death the plaintiff had lived with him and his daughters at the farm. The nephew also lived at the farm and helped in its management up to the time of the testator's death. The testator left two daughters, Hilda Mary and Elizabeth Millicent, both unmarried and under twenty-one years of age at the date of his death. Elizabeth Millicent, the younger daughter, attained twenty-one years of age on January 22, 1926. Hilda Mary married in 1924 and had at the date of this summons one child, Gwen Eira Griffiths (hereinafter called "the granddaughter").

The nephew married in 1921 and lived with his wife at the farm from 1924. In 1925 the plaintiff, her husband and the testator's daughter, Elizabeth Millicent, left the farm, but the nephew continued to live on the farm and manage it. By this summons the plaintiff asked (inter alia) whether, upon

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MAUGHAM a sale of the farm and lands under the statutory trusts, or upon the exercise by her of any power of leasing conferred on her by statute or by the will, and in particular upon the exercise of any such power in favour of the nephew, the nephew's life interest in the income would determine.

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L. B. Tillard for the summons.

F. C. Watmough for the nephew and the daughters. The effect of the imposition of the statutory trusts was to give to trustees all the powers of sale and leasing conferred on a tenant for life by the Settled Land Act, 1925. That is clear from s. 28, sub-s. 1, of the Law of Property Act, 1925. (1) To hold that, in the event of a lease or sale under these statutory powers, the forfeiture clause in the will would operate, would be to contravene s. 106 of the Settled Land Act, 1925 (2),

(1) Sect. 28, sub-s. 1 (as amended by the Schedule to the Law of Property (Amendment) Act, 1926): "Trustees for sale shall, in relation to land or to manorial incidents and to the proceeds of sale, have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority: . . ."

(2) Sect. 106, sub-s. 1: "If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted— . . ."

(b) attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him

to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, or his right to require the settled land to be vested in him;

that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void."

Sub-s. 2: "For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any such power or right as aforesaid shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power or right, discharged from liability to determination or cesser by or on his exercising the same."

Sub-s. 3: "Notwithstanding anything in a settlement, the exercise by the tenant for life or statutory owner of any power under this Act shall not occasion a forfeiture."

which replaces ss. 51 and 52 of the Settled Land Act, 1882. The condition in that clause involving forfeiture on failure to reside may be valid until a sale or a lease is made under the statutory powers, but it is void under s. 106 of the Settled Land Act, 1925, in so far as it may tend to prevent an exercise of those powers: *In re Patten*. (1) It is true that in the present case there is no "settlement," as there is a trust for sale; but the effect of s. 28 of the Law of Property Act, 1925, conferring the Settled Land Act powers, is to import the provisions of s. 106 of the Settled Land Act, 1925. It follows that no forfeiture is caused by a lease or sale made under the statutory powers.

Hon. Denys B. Buckley for the granddaughter. On January 1, 1926, the farm and lands vested in the plaintiff upon the statutory trusts under para. 1 (1.) of Part IV. of Sch. I. to the Law of Property Act, 1925. (2) Sect. 106 of the Settled Land Act, 1925, has no application to the present case, because the fact that the nephew's interest is given to him only "so long as he shall reside upon and assist in the management of my said farm" cannot be said to induce the plaintiff to abstain from exercising any of her statutory powers. Sect. 35 of the Law of Property Act, 1925, states the trusts upon which she is to hold the land. (3) It is

(1) [1929] 2 Ch. 276.

(2) Sch. I., Part IV., para. 1 (1.): "Where, immediately before the commencement of this Act, land is held at law or in equity in undivided shares vested in possession, the following provisions shall have effect:—

(1.) If the entirety of the land is vested in trustees or personal representatives (whether subject or not to incumbrances affecting the entirety or an undivided share) in trust for persons entitled in undivided shares, then—

(a) if the land is subject to incumbrances affecting undivided shares or to incumbrances affecting the entirety which under this Act or otherwise are not secured by

legal terms of years absolute, the entirety of the land shall vest free from such incumbrances in such trustees or personal representatives and be held by them upon the statutory trusts; and

(b) in any other case, the land shall be held by such trustees or personal representatives upon the statutory trusts; subject in the case of personal representatives, to their rights and powers for the purposes of administration."

(3) Sect. 35 (as amended by the Schedule to the Law of Property (Amendment) Act, 1926): "For the purposes of this Act land held upon the 'statutory trusts' shall be held upon the trusts and subject to the

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necessary to consider what the nephew's rights are within the meaning of that section. Before 1926 he was a tenant for life of the farm, and, as tenant for life, could join with the other tenants for life to sell or lease the land. He was entitled to a share of the income so long as he should reside upon and assist in the management of the farm. The effect of that limitation was modified in his favour by statute in particular events and to a particular extent. By virtue of s. 52 of the Settled Land Act, 1882, any exercise by him of his powers as tenant for life was not to occasion a forfeiture of his interest, and by virtue of s. 51 of that Act the provision, so far as it tended to prevent him from exercising those powers, was to "be deemed to be void." Upon the commencement of the Law of Property Act, 1925, the nephew ceased to be a tenant for life or to have any powers as a tenant for life. The rights to which, under s. 35 of the Law of Property Act, 1925, the trustee is to give effect, must be the rights existing when the land vested in the trustee upon the statutory trusts, i.e., in the present case, the right of the nephew to receive a share of the profits of the property "so long as he shall reside upon and assist in the management of my said farm" unmodified by any statutory provision. There is not and was not before 1926 any statutory provision that in such a case as the present the exercise by one person of a statutory power should not effect a forfeiture of another person's interest.

MAUGHAM J. [after stating the facts:] Prima facie the result of the will was that upon the younger daughter's attaining the age of twenty-one the income was to be held on trust for four persons in equal shares, but as regards one

provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such

powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land."

of them, the testator's nephew, subject to the qualification, "so long as he shall reside upon and assist in the management of" a certain farm. MAUGHAM J.

The first point to be decided is what the position of the nephew was before the commencement of the Law of Property Act, 1925. He was beyond dispute one of the tenants for life of the freehold farm; and having regard to ss. 51 and 52 of the Settled Land Act, 1882 (which are now replaced by s. 106 of the Settled Land Act, 1925), the provision as to his residing upon and assisting in the management of the farm, so far as it tended to prohibit or prevent him from exercising, or to induce him not to exercise, the power of sale or leasing, was to be deemed void: *In re Boyer's Settled Estates*. (1)

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Accordingly it was open to him before 1926, with the concurrence of the other tenants for life, to sell or lease the farm under the statutory powers without incurring a forfeiture. Under s. 39 of the Law of Property Act, 1925 (2), and under the provisions of Part IV. of the First Schedule to that Act, the freehold farm became subject to the statutory trust for sale. By s. 28 of the Law of Property Act, 1925 large powers are conferred upon trustees for sale. They are given all the powers of a tenant for life and of trustees of a settlement under the Settled Land Act, 1925, including the powers of management conferred by that Act during a minority. Sub-s. 2 provides (3) [His Lordship read the sub-section, and continued:] And s. 35 of the Law of Property Act, 1925, provides [His Lordship read the relevant part

(1) [1916] 2 Ch. 404.

(2) Sect. 39: "For the purpose of effecting the transition from the law existing prior to the commencement of the Law of Property Act, 1922, to the law enacted by that Act (as amended), the provisions set out in the First Schedule to this Act shall have effect—

(4.) for subjecting land held in undivided shares to trusts for sale; . . ."

(3) Sect. 28, sub-s. 2: "Subject to any direction to the contrary in the disposition on trust for sale or in the

settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested."

MAUGHAM of the section and continued:] The question that arises is whether, inasmuch as the land is now held upon the statutory trusts for sale, the exercise of those trusts will have the effect of putting an end to the nephew's interest if and in so far as it will preclude him from residing upon and assisting in the management of the farm, or whether, on the true construction of s. 35 of the Law of Property Act, 1925, the "powers and provisions" therein mentioned include a provision that the exercise of the statutory trusts shall not occasion a forfeiture.

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The question has been well argued before me, and I agree that s. 35 of the Law of Property Act, 1925, does not very distinctly point to the latter alternative. But, as has been observed before, it is right in the case of complicated legislation such as that of 1925 to place a benevolent construction on the various sections, and in a case of doubt to avoid the result that rights possessed before the coming into force of the Act are seriously affected or even destroyed as a consequence of a difference in the legal machinery which the Legislature has thought fit to create in an endeavour to simplify the law. Since January 1, 1926, the nephew's rights in the farm have been modified. He is not entitled to prevent the trustee from exercising the statutory trusts, which override his powers, and the right to prevent either a sale or a lease, which he had before 1926, no longer exists. He is apparently left with such protection (if any) as may be afforded by the provisions of s. 26, sub-s. 3, of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926. (1)

On the whole I come to the conclusion that, in order to give effect to the rights of the nephew as a person interested

(1) Sect. 26, sub-s. 3 (as enacted by the Schedule to the Law of Property (Amendment) Act, 1926, in substitution for the original subsection): "Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent

with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this subsection have been complied with."

in the land before 1926, it is necessary to hold that the "powers and provisions" referred to in s. 35 include, by implication, a provision the effect of which will preclude the possibility of the nephew forfeiting his interest in the farm during his lifetime by reason of the exercise of the statutory trusts. It follows that, if there is a sale or a lease under the statutory trusts (and I cannot distinguish between the case of a lease to the nephew and that of a lease to a third party), the provision putting an end to his interest if he shall cease to reside upon the farm must be deemed to be void, and that such an event will not cause a forfeiture of his interest.

Solicitors: *Tamplin, Joseph, Ponsonby, Ryde & Flux, for Hanson & Nash, Swansea.*

K. R. A. H.

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THE ROYAL SOCIETY FOR THE ENCOURAGEMENT
OF ARTS, MANUFACTURES AND COMMERCE.

Jan. 20, 21.

[1931. C. No. 4482.]

Charity—Society entitled to hold Real Estate in Mortmain—Fund for Preservation of Ancient Cottages—Devise of Cottages to the Society—Bequest of 700l. for Maintenance—Objects of Fund Charitable—Good Charitable Devise and Bequest.

A testator devised to the Royal Society of Arts two ancient cottages in order that the Society might preserve them in their present condition. He also gave 700l. to the Society upon trust to invest and to apply the income for the maintenance of the cottages. The Society had issued an appeal to form a Fund for the Preservation of Ancient Cottages, of which the testator was aware. The Society was by its charter authorized to hold real property in mortmain. The objects of the fund were to preserve ancient cottages as specimens and models of English craftsmanship so as to teach the lessons of such craftsmanship. These cottages were Elizabethan and picturesque:—

Held, that the primary object of the fund was for the good of the community at large, and was charitable in the legal sense; that the cottages fell within the objects of the fund; and that the devise and bequest were charitable.

In re Verrall [1916] 1 Ch. 100 followed.

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—

This summons raised the question whether a devise of certain ancient cottages to the Royal Society of Arts and a bequest of 700*l.* for their maintenance was a charitable devise and bequest, or invalid as infringing the rule against perpetuities.

James Cranstoun, K.C., by his will dated April 27, 1925, appointed the National Provincial Bank, Ltd., executor and trustee thereof, and devised and bequeathed all his real and personal property to his executor and trustee upon trust for sale and conversion, with power to postpone the sale and conversion, and to invest the proceeds of such sale and conversion as therein directed and to hold such investments upon trust to pay the income to his sister Margaret Cranstoun for her life, and subject thereto upon trust to pay a large number of legacies of 1000*l.* each, and to hold the remainder of his residuary estate upon trust for the Radcliffe Infirmary and County Hospital, Oxford, St. Bartholomew's Hospital, the London Fever Hospital, and the Royal National Lifeboat Institution in equal shares. The testator added the following provision: "It is my wish that my freehold cottages and land in Oxfordshire shall be sold as soon as conveniently may be after my death, and also such of the contents thereof belonging to me as my said sister Margaret may not desire to keep."

The testator made a codicil to his will, dated April 29, 1929, whereby he revoked the direction as to the said cottages, and in lieu thereof devised "the said freehold cottages and land in Oxfordshire known as Garden Cottage, Drayton St. Leonard near Oxford, together with the grounds on both sides of the River Thame attached thereto to the Royal Society of Arts in order that they may preserve the same in their present condition or as near thereto as possible, And I bequeath to the said Society the sum of seven hundred pounds to be held by the Society upon trust to invest the same and apply the income to be derived therefrom in maintaining the said property. My reason for this devise and bequest is that the said property is of a picturesque description and I should like it to remain as it is."

The testator died on March 4, 1931, without having further altered his testamentary dispositions, and the will and codicil were duly proved on May 1, 1931. The question arose whether the devise and bequest were charitable, and the Charity Commissioners desired that it should be decided by the Court.

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The Royal Society of Arts was incorporated by Royal Charter in 1847. By the Charter the Society was made capable, notwithstanding the Statutes of Mortmain, of taking, possessing, holding and enjoying to them and their successors, "a hall or house and any messuages lands tenements or hereditaments whatsoever the yearly value of which including the site of the said hall or house not to exceed in the whole the sum of 3000*l.* computing the same respectively at the rack rent which might have been had or gotten for the same respectively at the time of the purchase or acquisition." By the said Charter Her Majesty granted her "special licence and authority unto all and every person and persons bodies politic and corporate otherwise competent to grant sell alien and convey in mortmain unto and to the use of the said Society any messuages lands tenements or hereditaments not exceeding such annual value as aforesaid." Evidence was given that the annual value of the lands, messuages and other property held by the Society at the present time, including the cottages in question, did not amount to 3000*l.* The Society is a voluntary association, and no profit is made by its members, all subscriptions, donations and other income being applied, after payment of necessary expenses, for the purposes of the Society.

In 1927 the Society determined to form a special fund for the preservation of ancient cottages, and issued an appeal by Mr. Stanley Baldwin, as chairman of the fund, inviting subscriptions to the fund from the public. Evidence was given by Miss Margaret Cranstoun, the sister of the testator, that the testator applied for and received a copy of this appeal, and after reading it informed her of his intention to give the cottages to the Society that they might be preserved in their present condition, and to give also the

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These cottages at Drayton St. Leonard had been purchased by the testator in 1918 at the price of 530*l.*, and had been occupied in the summer by the testator and his sister down to the summer of 1930. They were described at the time of the sale as "Two genuine Elizabethan cottages," and were thatched cottages of a very picturesque appearance, situate on the banks of the River Thame, from which they were visible by a large number of people passing by in the summer on the river. They were not situate on any main road.

The Society were willing to accept the devise of the cottages, and, as it was by the Charter entitled to hold real estate, it could have accepted the devise had not the bequest of the 700*l.* for the maintenance of the cottages raised the question whether or not the devise and bequest were charitable. Unless the bequest was charitable it could not be paid to the Society, and it was suggested that the bequest raised the same question as to the devise. The Society proposed to lease the cottages to a tenant, who would keep them in a state of repair, but no provision had been agreed to that persons desirous of inspecting the cottages should be allowed to do so.

The National Provincial Bank, as trustee, issued this summons to decide whether the devise and bequest were valid as being charitable or not, and made defendants the Society, the Attorney-General, Miss Margaret Cranstoun, and the National Lifeboat Institution as representing the residuary legatees, of which it was one.

Sir Arthur Underhill for the National Provincial Bank.

Baden Fuller for the Royal Society of Arts. I submit that the devise of the cottages to the Society is an absolute gift which the Society can accept under its Charter. In the bequest of the 700*l.* the testator expresses a wish and does not create a trust. In *In re Chardon*. *Johnston v. Davies* (1) Romer J. held that a gift so long as a grave was maintained

did not infringe the rule against perpetuities. If this be not an absolute gift the gift is one to the Society as the custodians of the Preservation of Cottages Fund, which is a charitable fund. In *In re Verrall* (1) Astbury J. held that the objects of the National Trust for Places of Historic Interest or Natural Beauty were charitable objects, and the same principle will apply here. In *Commissioners for Special Purposes of Income Tax v. Pemsel* (2) Lord Macnaghten goes into the question of the legal meaning of "charity," and holds that it applies to trusts beneficial to the community other than those specified in the other definitions in the Statute of Elizabeth. I submit that this trust is for the benefit of the community, and that the Society, and especially the fund here in question, exist for charitable purposes.

Stafford Crossman for the Attorney-General. It is clear, I think, that the devise here is upon a trust, looking at the wording of the gift of the 700*l.*, and I submit that it is for charitable purposes. The testator knew of the fund and evidently intended his gift to fall within its objects. *In re Verrall* (1) shows that such a gift is charitable, as the purposes of this fund are very similar to those of the National Trust. The devise is for public purposes and for the benefit of the nation at large.

Gover K.C. and *W. E. Vernon* for Miss Margaret Cranstoun. Miss Cranstoun, knowing her brother's views and intention, desires to support the contention that this is a good charitable devise. It is given to the Fund for the Preservation of Ancient Cottages, of which the testator knew, and we submit that that fund is for educational purposes in preserving good architecture and craftsmanship. *In re Holburne. Coates v. Mackillop* (3) supports this view.

Wilfrid Hunt for the National Lifeboat Institution, one of the four residuary legatees. As representing the other residuary legatees I must contend that the devise is void. It is clearly a trust and not an absolute gift, and it is obviously in perpetuity. By the terms of the fund the cottages should

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(2) [1891] A. C. 531, 581, 583.

(3) (1885) 53 L. T. 212.

FARWELL J. might be let to working men, but that is not intended here. It might be for the good of the nation if the cottages were preserved for the public, but it is not intended that the public should inspect them. They are not visible from a road but only from the river, which is not frequented here by the public. The testator's intention was that the cottages should be preserved for their picturesqueness and for no other purpose.

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FARWELL J. [after stating the will and codicil of the testator and the facts concerning the cottages which had been given in evidence, continued :] The first question that I have to determine upon that devise is whether it is a devise of the freehold cottages subject to any, and if so what, trust, or whether it is a devise to the Society free from any trust at all. In my judgment, when one reads the whole codicil, or at any rate, the devise and bequest together, as I think I am bound to do, it is manifest that this creates a trust. It may be that, if there had been no bequest of the 700*l.*, the words "in order that they may preserve the same in their present condition or as near thereto as possible," standing alone with nothing else, might not have been sufficient to create a trust. I do not so decide, but it is possible that that might have been the result. But, if on those words the matter was open to doubt, the bequest of the 700*l.* in my judgment puts it beyond all reasonable question, because the 700*l.* is given to the Society upon trust "to invest the same and apply the income to be derived therefrom in maintaining the said property." That, in conjunction with the devise of the cottages themselves, makes it to my mind perfectly plain that the testator was devising the cottages and giving the money to the Society in trust to preserve the cottages in their present condition, or as near thereto as possible.

Now, if that creates a trust, the question then is whether that devise and bequest are a good devise and bequest, or whether they fail as offending the rule against perpetuities ; on the ground that the purpose for which they are given is not a charitable purpose. In order to see whether that be so or not it is, in my judgment, necessary to consider what

are the objects for which the Royal Society of Arts is to take the property in question. The evidence which I consider myself entitled to regard shows that the testator very shortly before making the codicil had seen a newspaper article which referred to the acquisition by the Royal Society of Arts of a number of beautiful cottages in a particular village of England, and that he caused inquiries to be made with regard to the acquisition by the Society of such property, and in response to those inquiries he received a document which is exhibited to the affidavit made by the testator's sister. Before I refer to that document I ought to go a little further back in the history of the Society. I am entitled in my judgment, in considering the objects for which the testator made this devise and bequest, to have regard to the fact that he made it knowing of the existence of the trust, of which the Society were the trustees, for the preservation of ancient cottages. Now, the Royal Society of Arts is a very old established corporation; it was incorporated by Charter in 1847, and it was established in 1754. I do not think that it is necessary for me to refer in any detail to the Charter of Incorporation beyond saying that the Charter enables the Society, notwithstanding the Statutes of Mortmain, to hold real estate so long as the yearly value of the land held by the Society does not exceed the sum of 3000*l.*, and the evidence is that the yearly value of the land which the Society now holds, together with this particular devise, will not exceed that sum. Accordingly, there is no difficulty, so far as the Statutes of Mortmain are concerned, in the Society taking and preserving this particular real property.

It appears that in comparatively recent times the Royal Society of Arts thought it desirable to institute an appeal for contributions for the purpose of forming a fund which would be used for the object of preserving ancient cottages and other buildings of a like nature in this country. The nature of the objects for which the fund was to be used appeared in an address, which is contained in exhibit M. C. 2 to which I have just referred, an address given by Mr. Stanley Baldwin, and it appears from that address, which was in the

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nature of an appeal, or, at any rate, a statement of the grounds upon which the appeal was being made, that it was to assist in the establishment of a substantial fund for application on the broadest national lines in furtherance of the objects above mentioned. The address proceeds to point out that there is nothing more characteristic of England's countryside than the cottage homes, and that they are part of our country, part of our inheritance, and part of our national life. Then Mr. Baldwin goes on to state that "We have, however, neither preserved these priceless gems of English craftsmanship, nor have we learnt the lesson that many still remain to teach"; and he says later on: "We have to see if we cannot once again tap the springs of craftsmanship which have not flowed in this country for so long. It is not a hopeless task, but it is a case of craftsmanship lying dormant among the people. It is there, and it has been called up here and there among various arts. I am quite certain that, if the right magician's wand were used, it would spring again into fertile being throughout the length and breadth of the country. It is peculiarly incumbent on us, and I think that we should insist, that the old tradition should carry on until a new tradition, possibly linked up with the old, is ready to take charge of these things in England." Then he says at a later stage: "The Royal Society of Arts have therefore decided to do what they can to save these cottages—not for the weekender, who may be left to look after himself—but for the benefit of those classes of local workers for whom they were originally intended. Further, as the Speaker of the House of Commons put it, the aim of the Society is to preserve these cottages not as museums, but as homes." Then later he says: "The advisory committee will appoint a small executive committee of experts, who will examine the claims of the different cases as they arise. This committee will recommend what action should be taken by the Council of the Royal Society of Arts, who, as trustees of the fund, will have to sanction expenditure before it can be made."

Then, in the document which sets out the purposes of the "Fund for the Preservation of Ancient Cottages," it is

provided that "The Council of the Royal Society of Arts have power to invest or expend all monies subscribed to the fund. The word 'cottages' shall be deemed to include other buildings of a similar character connected with the life of cottages, such as barns, farmhouses, mills, etc. . . . The primary object of the fund shall be to to preserve Ancient Cottages." Then it sets out various purposes, but I think that the whole thing really may be summed up in this way. The object, or the primary object, of this fund, of which the Royal Society of Arts is trustee, is to preserve such ancient buildings as it may be desirable to preserve for two main reasons: (1.) because they are of interest, as being something historical, as it were, visible examples of past history; and (2.) because they exhibit arts of craftsmanship which may have been to some extent lost, and the consideration and study of which may tend to teach and educate people at the present day in methods of building new cottages which have to be built to satisfy modern requirements. That being so, as it seems to me, the primary object with which the Royal Society of Arts is concerned in connection with this particular activity is for the good of the community as a whole. It must be for the advantage of the whole of the people of this country that they should have an opportunity of seeing beautiful and picturesque buildings and cottages of this kind, which have in addition the historical interest which such buildings necessarily bear; and it must also be for the benefit of the community that any devices of good craftsmanship in the building of these cottages should be preserved; and looking at it from the broadest point of view, as I think I am bound to do, it seems to me that there can be no real doubt that the object, and the primary object, of this trust is charitable in the legal meaning of that word.

If authority was wanted to support the view which I take in regard to this trust, I think it is to be found in the decision of Astbury J. in *In re Verrall*. (1) In that case Astbury J. was considering the National Trust for Places of Historic Interest or Natural Beauty, and he came to the conclusion,

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that the objects of that trust were charitable in the legal sense of the word. That authority, I think, really covers this case, and it may be that it would have been sufficient for me to say that I follow it. But, having regard to the fact that there are some differences, at any rate as to the purposes or the method of employing the properties which this trust may acquire, I thought it right to express my own view, and the reasons which have led me to that view—namely, that this is in fact a charitable trust. Mr. Hunt has pointed out, and pointed out with great force, that these particular cottages are not likely to be of any general benefit to the community. They are not visible from any public road, although they are visible from the river, and, if the Society carry out what I gather is their present intention of letting their cottages to a person who is not of the working class, without any preservation of the right to allow the public to inspect them, Mr. Hunt suggests that there is really no benefit at all to be derived for the community from these particular cottages, or from this particular devise or bequest. I appreciate the force of that argument, but, on the other hand, the mere fact that these cottages are not actually upon a public road does not in my judgment carry the matter very far. It is open to the Society to attract, by notices or otherwise, the attention of the public to these particular cottages if they think that in that way public purposes will be served. With regard to the second objection, I have been most careful not to express any view as to the propriety or otherwise of the way in which the Society is proposing to deal with these cottages. Whether such an use as is suggested is strictly consistent with their trust, or the purposes for which this fund and property are held is open to question. I am not saying that it is not, and I am not saying that it is, but I think that the Society should carefully consider whether, having regard to the objects of the fund, it ought not at any rate to preserve to the public the right of inspecting these cottages in whosoever occupation they may be. I am not asked to decide that question, and it is not necessary for me to decide it, since the fact that the Society may be proposing

to deal with this particular property in a way that is not consistent with their trust will not make the trust any the less a charitable devise and bequest. It may be a breach of trust to deal with it in that way, but that does not prevent the devise and bequest being a good charitable devise and bequest.

In these circumstances, in my judgment, the result of this summons must be that I decide that the devise of the cottages and the bequest of 700*l.* is a valid devise and bequest.

His Lordship made an order that the Society should retain the cottages unsold in order to avoid the necessity of their being sold within a certain period under s. 8 of the Mortmain Act, 1888.

Solicitors : *Willis & Willis ; Bristows, Cooke & Carpmæl ; Solicitor to the Treasury ; Clayton, Sons & Fergus.*

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[No. 20 of 1930.]

Bankruptcy—Loans to Bankrupt—Mortgage of Bankrupt's Farming Stock—Agricultural Charge—Notice to repay Loan—Sale by Mortgagee of Bankrupt's Assets—Enforceability of Charge—Limitation of Mortgagee's Rights—Agricultural Credits Act, 1928 (18 & 19 Geo. 5, c. 43), s. 12.

A bank, having advanced money to a farmer on an agricultural charge within the meaning of the Agricultural Credits Act, 1928, in the year 1930 called in the money and threatened a sale, but did not until after January 1, 1931, appoint an agent for sale or proceed to a sale:—

Held, reversing the decision of the county court judge, that the bank's charge was not enforced until after January 1, 1931, and that accordingly the restrictive provisions of s. 12 of the Agricultural Credits Act, 1928 (which applied only until January 1, 1931), did not govern the case, and that the bank was therefore entitled to retain out of the proceeds of sale the whole amount of its debt without regard to those restrictive provisions.

MOTION.

These proceedings raised a question of the construction of s. 12 of the Agricultural Credits Act, 1928. In 1928 John Jones (hereinafter called "the debtor") was carrying on business as a farmer at Newton Manor Farm, Newton, near Rugby. On July 4, 1928, he applied to the respondents, the National Provincial Bank, for a loan. By an agreement in writing dated December 18, 1928, made by way of agricultural charge, and made between the debtor, his wife and son trading as "John Jones" farmers within the definition in the Agricultural Credits Act, 1928 (thereinafter called "the mortgagor") of the one part and the said National Provincial Bank, Ltd. (thereinafter called "the bank") of the other part, the mortgagor covenanted with the bank to pay them on demand (*inter alia*) all sums of money owing or to become owing by the mortgagor on current account, and for further securing the payment of the moneys so owing, the mortgagor as beneficial owner thereby charged by way of specific charge the property set out in a schedule thereto, being certain farming stock, and by way of floating charge

all other the farming stock and other agricultural assets as defined by the Agricultural Credits Act, 1928, from time to time belonging to the mortgagor with the payment to the bank of the moneys so owing as aforesaid. And by the agreement it was thereby (inter alia) agreed and declared that the said floating charge should as regards the property subject thereto become a fixed charge (in addition to the events mentioned in s. 7 of the Agricultural Credits Act, 1928) if the bank required payment of the moneys owing on the said security and the mortgagor failed to pay the same, and if this event should happen the bank were empowered to give to the mortgagor notice in writing to that effect, and seize and take possession of any property subject to the said floating charge and the property (if any) thereby specifically charged and might exercise the power of sale conferred by the said Agricultural Credits Act, 1928, by auction or private treaty.

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It was maintained by the official receiver as trustee of the estate of the debtor (who was subsequently adjudicated a bankrupt as hereinafter mentioned) that although the agreement was executed by the wife and son of the debtor there was in fact no partnership subsisting between them, and the only person affected by the agreement and subsequent transactions was the debtor himself. This point, however, was not raised in the proceedings, and the charge was treated simply as one by the debtor alone. It is therefore not dealt with for purposes of this report.

On December 21, 1928, the charge was registered at the Land Registry as a land charge. On September 3, 1930, the bank gave notice in writing in pursuance of s. 7 of the Agricultural Credits Act, 1928, to the debtor demanding payment of the moneys due and owing on the security of the agricultural charge of December 18, 1928, and also that unless the amount was paid, the bank would proceed in due course to exercise the powers conferred on them by the said charge. On October 27, 1930, a receiving order was made on a creditors' petition against the debtor, and on November 14, 1930, the debtor (hereinafter called "the

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bankrupt") was duly adjudicated a bankrupt. At the date of the receiving order the bankrupt's account with the bank was in debit to about 700*l.* The official receiver became the trustee of the bankrupt's estate.

The bankrupt died on January 8, 1931, and on January 14, 1931, the assets of the bankrupt covered by the agricultural charge were, after due notice, sold on behalf of the bank by their agent and realized 1151*l.* 17*s.* 7*d.*

At the date of the passing of the Agricultural Credits Act, 1928—namely, August 3, 1928—the bankrupt's account with the bank was overdrawn to the extent of 477*l.* 7*s.* 8*d.*, and at the date of the sale by the bank on January 14, 1931, the amount alleged by the bank to be owing was 711*l.* 5*s.* 11*d.*

The question of how much of the sum realized by the sale the bank was entitled to retain having arisen, it was contended by the official receiver as trustee on behalf of the bankrupt's estate that by virtue of s. 12 of the Agricultural Credits Act, 1928 (1), the bank's charge was enforceable only in respect of the overdraft in excess of 477*l.* 7*s.* 8*d.*, and that they were not entitled to hold the sum which they alleged was due to them—namely, 711*l.* 5*s.* 11*d.*—in so far as it exceeded the said sum of 477*l.* 7*s.* 8*d.* The bank, on the other hand, contended that they were entitled to hold the sum so realized so as to cover the full amount which they alleged to be due to them—namely, 711*l.* 5*s.* 11*d.*—and that the notice of September 3, 1930, did not amount to an enforcement of the charge created in their favour within the meaning of s. 12. Their security was not, as they alleged, enforced until the sale of the bankrupt's assets covered by the charge on January 14, 1931.

A motion was accordingly brought by the official receiver as trustee of the bankrupt's estate in the Warwickshire

(1) Agricultural Credits Act, 1928, s. 12: "Until the first day of January, nineteen hundred and thirty-one, the foregoing provisions of this Part of this Act shall be subject to the following modification:—

"Where a bank has before the passing of this Act made advances

to a farmer, whether by means of an overdraft or otherwise, an agricultural charge created in favour of the bank shall be enforceable only in respect of moneys advanced in addition to and in excess of a sum equal to the amount of such advances outstanding at the passing of this Act."

County Court at Coventry for (inter alia) a declaration that the charge given on December 18, 1928, in favour of the respondents, the bank, under the provisions of the Agricultural Credits Act, 1928, was enforceable only in respect of moneys advanced in addition to and in excess of a sum equal to the amount of such advances outstanding at the passing of the Act. In other words the bank claimed to deduct from the sum of 1151*l.* 17*s.* 7*d.* the full amount of the bankrupt's overdraft, amounting to 711*l.* 5*s.* 11*d.*, whereas the official receiver as the applicant contended that the bank was only entitled to deduct out of that sum 233*l.* 18*s.* 3*d.*, that was the difference between 711*l.* 5*s.* 11*d.* and 477*l.* 7*s.* 8*d.*, the amount of the overdraft existing at the date of the passing of the Act of 1928. By an order of the county court judge dated October 20, 1931, it was declared that the charge in question was enforceable only in respect of moneys advanced in addition to and in excess of the sum of 477*l.* 7*s.* 8*d.*, the amount of such advances outstanding on August 3, 1928, the date of the passing of the Agricultural Credits Act, 1928. And it was ordered that the bank, the respondents, should pay over to the trustee of the bankrupt's estate, the applicant, so much of the proceeds of the property of the bankrupt comprised in the said charge realized by them by virtue of the said charge as was in excess of the sum required to satisfy the said charge.

From this order the respondents, the bank, appealed. The appeal came before a Divisional Court consisting of Luxmoore and Farwell JJ. on December 14, 1931, but a question having arisen as to the applicability of the case *Devaynes v. Noble; Clayton's Case* (1) the motion was ordered to stand over to the following sittings.

Cyril Conner for the appellants. The question is whether what the appellants, the bank, have done amounts to "enforcing" their charge, so as to come within s. 12 of the Agricultural Credits Act, 1928. In *Deeley v. Lloyds Bank*,

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CLAUSON *Ld.* (1), the rule known as the rule in *Clayton's Case* (2) is and LUXMOORE stated by Lord Atkinson.

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C. Tindale Davis for the official receiver, respondent.

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CLAUSON J. This motion comes before us by way of appeal from a decision of the county court judge of Warwickshire sitting at Coventry, and it raises a point under the Agricultural Credits Act, 1928. The point arises in this way. The Act came into operation on October 1, 1928, but it was passed on August 3, 1928. At the moment at which the Act was passed, a sum of 477*l.* 7*s.* 8*d.* had been advanced by the appellants, a bank, who were respondents to the original motion, to the bankrupt on overdraft. The agricultural charge in question was executed on December 18, 1928. It was a charge in favour of the bank to secure all the moneys then owing or which might thereafter be owing on current account. By way of security the mortgagor charged his farming stock and other assets as a charge under the Agricultural Credits Act, 1928, and he charged it by way of floating charge in accordance with that Act.

The Act in question by s. 5, enables a farmer to charge in favour of a bank by way of an "agricultural charge," all or any of his farming stock and other agricultural assets. By sub-s. 2, the charge can be either a fixed charge or a floating charge.

After the charge had been created payments were made into and out of the account, and ultimately on September 3, 1930, the bank, being desirous of requiring payment of what was due to them on the security, served a formal demand, the receipt of which was acknowledged on the following day. Under the charge created by the mortgagor, it was provided that the floating charge should become a fixed charge in various circumstances, one event being if the bank required repayment of the moneys owing on the security and the mortgagor failed to repay the same. The consequence accordingly of the service of the notice on the mortgagor was to turn the floating charge into a fixed charge. The result was to place the mortgagor under

(1) [1912] A. C. 756, 771.

(2) 1 Mer. 572, 608.

somewhat larger disabilities than he was under by reason of the floating charge and to place the mortgagee in a position of somewhat greater advantage. On October 27, 1930, there was a receiving order made against the mortgagor, and he was adjudicated a bankrupt on November 14, 1930.

During all this time the bank took no further step; the official receiver on the making of the receiving order stepped into the bankrupt's shoes and retained possession of the assets, which were charged to the bank. The end of the year was reached, and January 1, 1931, came. Then the bank proceeded to appoint an agent to take possession of the assets and sell, and the agent in fact took possession and sold on January 14. There is no question at all that on January 14, 1931, at the latest, the bank enforced their charge.

It is, however, material to consider whether or not the bank enforced their charge at an earlier date, because the Act provides that until January 1, 1931, the rights of a bank are to be limited in a way indicated in s. 12. But there is no dispute that after January 1, 1931, the section no longer operates. Sect. 12 is as follows: "Until the first day of January, nineteen hundred and thirty-one, the foregoing provisions of this Part of this Act shall be subject to the following modification:—Where a bank has before the passing of this Act made advances to a farmer, whether by means of an overdraft or otherwise, an agricultural charge created in favour of the bank shall be enforceable only in respect of moneys advanced in addition to and in excess of a sum equal to the amount of such advances outstanding at the passing of this Act." That section, if it applies to the present case, may have the effect that the bank—instead of being at liberty to enforce its charge for the sum that was actually due on the overdraft at the moment when the security is enforced—may have to suffer a diminution of that sum by some figure which has relation to the figure of the overdraft as it existed at the moment the Act was passed. Accordingly it is of course of vital importance that the bank should satisfy the Court, if possible, that this section does not apply to the rights of the bank in respect of

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CLAUSON the retainer of the proceeds of sale which came into their
and hands when they sold on January 14, 1931.
LUXMOORE

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It is admitted that the section would not apply if the bank had not called in the principal mortgage until after December 31, 1930. It is suggested that by reason of the fact that on September 3 the bank gave notice calling in the money, with the result that their floating charge became a fixed charge, it can be said that the bank enforced their security on September 4, when that notice became effective; and that they accordingly enforced it at a time when s. 12 was operative and therefore must enforce it subject to the provisions of that section. That was the view, as I understand it, of the county court judge. He thought that the giving of the notice and the consequent change in the character of the security, from being a floating charge to a fixed charge, amounted to enforcement, and that that was the date to which his attention had to be directed in considering the amount in respect of which the bank could claim security.

In my judgment that view taken by the learned county court judge was erroneous. In my view the notice was a step, preliminary no doubt, to enforcement, but not a step which enforced the security: it was a step taken with a view to the subsequent enforcement of the security. The notice had the effect of changing the security and making the security more advantageous to the mortgagee than it had been before. That does not seem to me to be an enforcement of the security. Suppose that the mortgagee was in a position to bring pressure to bear, by reason of his position as mortgagee, upon the mortgagor to give him additional security, it would be a misuse of language to call that an enforcement. In the same way, it seems to me that the doing of an act which may make his position stronger is not an enforcement of the security. The enforcement of the security took place in my judgment when, an agent for sale having been appointed, the agent sold. It is possible the enforcement of the security began when he took possession with a view to sale. It is not necessary to answer that for the purpose of this case. The agent did not take possession or

sell until after January 1, when the modifications embodied in s. 12 were no longer applicable as between the parties. CLAUSON
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In my view the judgment of the county court judge was erroneous and the bank has the right to retain out of the proceeds of sale the sum of 711*l.* 5*s.* 11*d.* which they claim. Assuming that my learned brother takes the same view as I do, our order will be to reverse the judgment below and make a declaration that that is the sum they are entitled to retain. 1932
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LUXMOORE J. I agree and have nothing to add.

Solicitors : *Wilde, Wigston & Saptés ; Band, Hatton & Co., Coventry.*

A. R. T.

In re P. E. AND B. E. KERN.

[No. 30 of 1930.]

CLAUSON
and
LUXMOORE
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Bankruptcy—Judgment Debt—Execution—Incomplete at Date of Receiving Order—Benefit of Execution—Part Payment to withdraw Sheriff—Further Payments to avoid Seizure—Payment before the Date to which the Trustee's Title related back—Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 37, 40.

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Sect. 40 of the Bankruptcy Act, 1914, which enacts that an execution creditor shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy, unless he has completed the execution before the date of the receiving order, is a substantive enactment, and the right of the trustee thereunder is not limited to benefits of execution received by the execution creditor after the date to which the trustee's title to the bankrupt's property relates back under s. 37 of the Bankruptcy Act, 1914.

APPEAL from the Exeter County Court.

The material facts, which were not in dispute, are as follows :—

On August 22, 1930, Thomas Henry, *Ld.*, creditors, issued execution against the goods of the debtors to enforce their judgment to recover a sum of 214*l.* It was agreed between them that in consideration of the creditors withdrawing the

CLAUSON sheriff, who had levied execution, the debtors should pay to
and
LUXMOORE the creditors 100%. on account of the judgment debt, and should
JJ.
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P. E. AND pay the balance thereof by monthly instalments of 20%. each,
B. E. KERN, the debtors authorizing the sheriff to retake possession in
In re. case of default in the payment of the agreed instalments.

On August 30, 1930, the debtors, in pursuance of the agreement, paid to the execution creditors the sum of 100%. and the costs of the execution, whereupon the sheriff withdrew from possession.

On September 26, 1930, the first of the monthly instalments of 20%. was paid by the debtors to the execution creditors, and on October 27, 1930, another instalment of 20%. was paid, but, owing to default in the payment of any further instalment, on December 13, 1930, the sheriff, on the creditors' instructions, re-entered into possession.

On December 16, 1930, a receiving order was made on the debtors' own petition presented on the same day, and the debtors were adjudicated bankrupts and the sheriff again withdrew from possession.

Upon the execution creditors' refusal to repay to the trustee any of those three sums which they had so received from the bankrupts, proceedings were taken by the trustee by motion in the Exeter County Court for the recovery of those sums, and the county court judge on January 13, 1932, adjudged that the same were repayable to the trustee in pursuance of s. 40 of the Bankruptcy Act, 1914, as moneys paid under an execution which was not completed before December 16, 1930, when the receiving order was made, and accordingly, the execution creditors were ordered to repay those sums to the trustee.

There was lack of evidence before the Court to establish the existence of any available act of bankruptcy other than the presentation of the debtors' petition on December 16, 1930.

Hartley W. Shawcross for Thomas Henry, Ltd., the appellants. Upon the proper construction of s. 40 of the Bankruptcy Act, 1914, that section does not expressly confer upon the trustee a title to any of the three sums received by them. All that

the section says is that the execution creditor shall not be entitled to retain the benefit of the execution, unless the execution is completed before the receiving order is made, but it does not vest in the trustee any right to be repaid the money. As to the two sums of 20*l.* and 20*l.*, as, under s. 37 of the Act of 1914, there could have been an available act of bankruptcy before the date when the first of those two sums was received, I will admit that the appellants are not entitled to retain those sums as benefits of the execution under s. 40, and I feel some difficulty in resisting the claim of the trustee to be repaid those sums. The decision in *In re Brelsford* (1) seems to cover the question so far as those two sums are concerned. As to the sum of 100*l.* which was paid to the appellants before the earliest date to which the title of the trustee to the bankrupts' property could have related back under s. 37, the appellants are entitled to retain that sum. The tendency of legislation down to the Bankruptcy Act, 1883, has been to protect the execution creditor and not to penalize him. It is clear that, but for s. 40 of the Act of 1914, the appellants would be entitled to retain the 100*l.* so paid to them against the trustee. It is submitted that the trustee cannot found his title to the moneys paid to the execution creditors wholly on s. 40; it is necessary for him, relying on s. 37, to satisfy the Court that the moneys were received by the appellants before the date to which the title of the trustee to the bankrupts' property related back in fact. Further, it would inflict a hardship on an execution creditor if there were no limit to the time after which a trustee might under s. 40 require repayment from him. As was pointed out by Astbury J. in *In re Fairley* (2): "The trustee's contention pushed to its logical conclusion would lead to an absurd result. If an execution had been issued nineteen years before a bankruptcy, and the execution creditor had been paid the greater part of his money by arrangement and the sheriff had retired but without any seizure and sale the moneys could have been recovered in the long subsequent bankruptcy. I do not believe that that is the meaning of

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(1) P. 24 ante.

(2) [1922] 2 Ch. 791, 795.

CLAUSON the section at all." There must be a limit to the length of
 and
 LUXMOORE time after which the trustee can recover moneys so paid
 JJ. to an execution creditor, and that limit is the three months
 1932 period referred to in s. 37. In *In re Chiandetti* (1) Horridge J.
 P. E. AND observed that the transaction took place long before the
 B. E. KERN, commencement of the three months before the presentation
In re. of the petition and was, therefore, not available in that case
 for the trustee's title. Sect. 40 speaks of the execution
 creditor having no right to retain against the trustee in
 bankruptcy of the debtor; the section pre-supposes a claim
 to the benefit of the execution by the trustee which could only
 be founded on a title acquired by virtue of s. 37. When it
 is intended that the title of the trustee shall not be restricted,
 as it is by s. 37, the Legislature does so in express terms:
 see ss. 42, 44 of the Act of 1914, which expressly make void
 certain settlements and conveyances in favour of preferred
 persons.

W. N. Stable for the respondent, the trustee in bankruptcy.
 The case is covered by *In re Brelsford*. (2) Not until the
 Bankruptcy Act of 1883 was there any equivalent to s. 40
 of the present Act of 1914. Sect. 87 of the Act of 1869 was
 on the same lines as s. 41 of the Act of 1914. Sect. 45 of the
 Act of 1883 put an additional restriction upon the rights of
 the execution creditor similar to that contained in s. 40 of
 the Act of 1914. The words are: "shall not be entitled to
 retain, . . . unless," etc. The section is free from ambiguity,
 and it is unnecessary to qualify and restrict the operation of the
 section by any reference to the relation back of the trustee's
 title. The trustee obtains a title by virtue of the section;
 it is unnecessary that he should have an additional title by
 virtue of relation back. If the trustee got a title by relation
 back, s. 40 would be unnecessary. Sect. 40 enacts that, in
 certain circumstances—namely, if the execution is not com-
 pleted, the execution creditor is not entitled to retain the
 benefit of his execution. Once exclude the title of the
 execution creditor and the title must be in the trustee, provided,
 as here, the money came from the bankrupt. In *Bower v.*

(1) (1921) 37 Times L. R. 984.

(2) P. 24 ante.

Hett (1), the sheriff was out of possession when the bargain was made; and, anyhow, there it was not the debtor's money but his father's. That case is distinguishable from the present on both the grounds on which it was decided. *In re Chiandetti* (2) is distinguishable on the facts, which were quite different. There the execution was completed long before the receiving order was made, and s. 40 did not apply. The controversy in that case was not with the execution creditor at all.

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Shawcross, in reply, referred to Mather's *Sheriff Law* (1903), 2nd ed., p. 100, and *Slater v. Pinder*. (3)

CLAUSON J. [after stating the material facts:] On December 13, 1930, the sheriff's officer re-entered on the instructions of the judgment creditors, and three days afterwards a receiving order was made against the judgment debtors. It does not actually appear to what date the title of the trustee related back; but it is admitted that the 100*l.* was paid long before the date to which the title of the trustee in bankruptcy to the property of the bankrupt could have related back, but that the two payments of 20*l.* and 20*l.*, making together 40*l.*, were made since that date. Counsel for the appellants were not prepared to argue that there was anything invalid or illegal in the arrangement made for the sheriff to go out of possession and later resume possession; and it will be understood that, in the observations I am now making, I am assuming, without in any way deciding, that there is no legal objection to that arrangement. Counsel for the appellants admitted that having regard to *In re Brelsford* (4) it was impossible for them to claim to retain the two sums of 20*l.* and 20*l.*; but, as regards the 100*l.*, he put forward a point which could on the facts of that case have been argued in *In re Brelsford* (4), but which unquestionably was not argued in that case. His point is this: while he admits that the conditions, as laid down in s. 40 of the Act of 1914, have been fulfilled, which disentitle

(1) [1895] 2 Q. B. 337.

(2) 37 Times L. R. 984.

(3) (1871) L. R. 6 Ex. 228;

affirmed (1872) L. R. 7 Ex. 95.

(4) P. 24 ante.

CLAUSON the judgment creditors to retain the sums now in question—
and
LUXMOORE namely, the 100*l.* and the two sums of 20*l.*, he points out
JJ. that the 100*l.*, differing in this respect from the two sums
1932 of 20*l.*, was received by the judgment creditors before the
P. E. AND date to which the trustee's title could have related back
B. E. KERN, under s. 37. As regards the two sums of 20*l.*, those, he
In re. admits, can be claimed by the trustee as part of the bank-
rupt's property passing to him under the doctrine of relation
back. He submits, however, that s. 40 does not assist the
trustee unless the latter can first establish a title under s. 37 ;
at that point s. 40, so he submits, intervenes and prevents
the judgment creditors from setting up a title against the
trustee. His contention is that, as regards the payment of
the 100*l.*, s. 40 does not give any positive right to the trustee
to claim that sum from the appellants, and accordingly they
are entitled to retain it. In my view of the words of the
section, the construction thus sought to be placed upon
them is erroneous. It appears to me that the section says
in terms as plain as one could desire that, if in the particular
circumstances in the section mentioned, that is to say, of a
receiving order having been made before completion of the
execution, the execution creditor has received fruits of the
execution, he shall not retain those fruits of his execution
against the trustee in bankruptcy ; in other words, he must
hand them to the trustee, if he asks for them. It appears
to me that there is nothing in the section which lays down
any limit of time or imports any other limitation on the
trustee's rights. It is suggested that this construction has
the result that, since an execution may, in accordance with
the practice to which I have alluded, be prolonged for many
years, the hardship is involved that after a long lapse of
time the trustee in bankruptcy, may be entitled to go back
to the beginning of the execution, and get back from the
execution creditor sums which he has received, it may be,
many years before. I confess that such possible result does
not strike me as a hardship. It must be borne in mind that
it is the execution creditors' own act which kept this execu-
tion on foot, assuming it could legally be kept on foot ; and,

further, they kept it on foot for their own benefit in order, no doubt, to obtain advantage by getting payment of instalments out of the execution debtors. I cannot see how the operation of the Act results in any hardship. The execution creditors have put themselves into this position entirely for their own purposes. If they chose to keep the execution on foot for a long time for their own purposes, I do not see how they can complain. Accordingly, as there seems to me to be no real hardship, I do not see why I should put any other construction on this section than that which appears to me to follow from the plain and obvious meaning of the words.

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Sect. 40 seems to me to be a substantive enactment, and the right of the trustee thereunder is not limited to the benefits of execution received by the execution creditors after the date to which the trustee's title to the bankrupts' property relates back.

In my view, therefore, the order made by the county court judge was correct. The execution creditors are bound to account, not only for the two sums of 20*l.* and 20*l.*, but also for the sum of 100*l.* The appeal must be dismissed.

LUXMOORE J. I agree.

Solicitors: *Philip Goodenday & Co., for A. Bieber & Bieber, Liverpool; Arnold Carter & Co., for C. Hamlyn Taylor, Paignton.*

H. C. H.

C. A. ATTORNEY-GENERAL v. SMETHWICK CORPORATION.

1931

[1931. A. 488.]

EVE J.

Dec. 8, 9, 16. *Municipal Corporation—Statutory Powers—Printing, Bookbinding, and Stationery—Printing Works on Corporation Premises—Purchase of Machinery out of General Rate Fund—Whether ultra vires—Application of Fund to Capital Expenditure—Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 139, 140, 143, 144, 149, Sch. V., Part II.*

A corporation, whose statutory duties imposed upon them an expenditure of between 5000*l.* and 6000*l.* annually on printing, stationery, and bookbinding, resolved to establish a centralized system whereby instead of each department sending out its own printing work and making its own stationery purchases, a printing, stationery, and bookbinding department should be organized employing direct labour under a manager on corporation premises, and printing and other machinery should be purchased, involving a capital outlay of 1000*l.* and an annual expenditure of about 1420*l.* An action was brought by the Attorney-General at the relation of a ratepayer claiming a declaration that it was unlawful and ultra vires the corporation and contrary to the provisions of the Municipal Corporations Act, 1882, to expend any part of the general rate fund of the borough for the purpose of establishing or carrying on a printing, bookbinding, or stationery works and an injunction to restrain them from so doing:—

Held, by Eve J., that as printing, bookbinding, and stationery work were necessarily incident to the performance by the corporation of its statutory duties, the expenditure was properly incurred and did not involve an improper or unlawful use of the general rate fund under s. 140 and Sch. V. of the Municipal Corporations Act. Though the general rate fund (called in the Act the Borough Fund) was mainly, but not wholly, made up of periodic payments, such as rates, rents, and profits and interest, there was nothing in the Act to prevent that fund being drawn on for expenditure on objects of a capital or non-periodic nature, such as printing machinery.

On appeal:—

Held (affirming Eve J.'s decision), (1.) that the formation of a department to do the printing, bookbinding, and stationery work of the corporation was incidental to or consequential upon the carrying out of the corporation's statutory duties and was not therefore ultra vires: *Attorney-General v. Great Eastern Ry. Co.* (1879) 11 Ch. D. 449, 484; (1880) 5 App. Cas. 473, 478 applied; (2.) that the expenses of forming and carrying on the department were expenses "necessarily incurred in carrying this Act into effect" within the Municipal Corporations Act, 1882, Sch. V., Part II., para. 12, and were therefore payments authorized to be made out of the general rate fund by s. 140 of the Act. It was immaterial that the expenditure on machinery was of a capital nature, as there were payments authorized in Sch. V. on other matters which involved capital expenditure.

WITNESS ACTION.

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—

The action was brought by the Attorney-General on the relation of Benjamin Thomas Hill, a ratepayer of the borough of Smethwick, alleging that the defendants, a municipal corporation, had resolved to establish and carry on a printing, stationery, and bookbinding department under the control of a manager whom they had engaged for that purpose, and to expend 1000*l.* in the purchase of printing and duplicating machines. The plaintiff claimed a declaration that it was unlawful and ultra vires the Municipal Corporations Act, 1882, for the defendants to expend any part of the general rate fund in establishing or carrying on printing, bookbinding or stationery works, and an injunction to restrain them from so doing. The defendants, by their defence, said that printing, bookbinding, and stationery work was required by them as a necessary incident to the performance of their statutory powers and duties, that in the past it had been the practice of the borough council to have some of this work done by direct labour and with their own machines on their own premises, each department doing its own work, and that in October, 1930, on the recommendation of a special committee they passed a resolution to extend this system by installing a central printing and bookbinding department under a manager, and to purchase new machinery for that purpose. They estimated that this would reduce the annual cost of printing and stationery required by the council, but it was not intended at present to do more than part of the printing required. The bookbinding done by the corporation was for its public library. The facts are fully stated in the judgment of Eve J.

Montgomery K.C. and *H. J. Astell Burt* for the plaintiff. The defendant corporation, by establishing their own printing and stationery works, has acted ultra vires the Municipal Corporations Act, 1882: *Attorney-General v. Manchester Corporation* (1); *Attorney-General v. Leicester Corporation*. (2) Printing and bookbinding do not come within the statutory

(1) [1906] 1 Ch. 643.

(2) [1910] 2 Ch. 359.

C. A. powers or duties of a municipal corporation. The Court is
 1931 not concerned to inquire whether the defendants have made
 ATTORNEY- either a profit or a loss on this department. This was entirely
 GENERAL overlooked in *Attorney-General v. Liverpool Corporation* (1), and
 v. the view of Russell J. to the contrary in the latter part of
 SMETHWICK his judgment dealing with the second ground of defence in
 CORPORA- that case was, we submit, erroneous.
 TION.

The expenditure was not necessarily incurred in carrying out the work imposed on the corporation by the Municipal Corporations Act. No doubt they require a large supply of printed documents and forms such as rate demands, but it is not necessary in order to get their printing done to purchase expensive machinery and engage a printing manager : *Mayor of Newcastle-upon-Tyne v. Attorney-General*. (2)

Gavin Simonds K.C. and *Andrewes-Uthwatt* for the defendants. The corporation has done a certain amount of its own printing for some years : what it is now proposing to do is to do most of the printing on its own premises, employing its own staff and using its own machinery. If it be within its powers, and we submit it is, it proposes later on to do the whole of the printing it requires. At present its equipment is only sufficient to do part of the work, and the printing bill of the corporation amounts to over 4000*l.* a year. Books purchased for or in use in the public library often have to be repaired or rebound.

It is not a question what the powers of the corporation are, but how those powers are to be executed. The corporation are not exceeding their powers by embarking on the printing trade, nor do they propose to open a stationer's shop, but they are entitled to do the printing they require by their own servants, and are not obliged to send it out to contractors : *Attorney-General v. Great Eastern Ry. Co.* (3) ; *Deuchar v. Gas Light and Coke Co.* (4) ; *Baroness Wenlock v. River Dee Co.* (5)

(1) [1922] 1 Ch. 211.

(3) 5 App. Cas. 473.

(2) [1892] A. C. 568.

(4) [1925] A. C. 691.

(5) (1885) 10 App. Cas. 354.

One of the most important duties of a municipal corporation is the maintenance of the roads within the borough, but it may be carried out in various different ways. An authority might let out the whole of the work to a contractor, or it might employ its own labour and purchase the material or, again, it might obtain all the material from its own quarry. The corporation, in this case, is doing part of its own printing, stationery, and bookbinding work, and sending the rest out to contractors, and in so doing it is acting *intra vires* and is not contravening any provision of the Municipal Corporations Act, 1882.

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Montgomery K.C. in reply. Under the Act provision is made for the levying of a rate which is periodic, and the proceeds of which are paid into and practically constitute the general rate fund. That fund, therefore, ought only to be used for periodic payments and not for capital purposes. If capital expenditure is needed it should be provided for by borrowing, but there is no power to borrow money to provide printing works. In the present case the corporation propose to spend over 1000*l.* on the purchase of printing machinery, which is capital assets. Their borrowing powers are contained in and limited by s. 107; and this is not one of the purposes for which power to borrow is given.

An act is not necessary merely because it enables a company to execute works more economically than it could otherwise do: *Fenwick v. East London Ry. Co.* (1)

[*EVE J.* referred to *Emsley v. North Eastern Ry. Co.* (2)]

It is necessary for the corporation to have office equipment, pens, ink and paper, and to-day typewriters, but the cost must be borne by revenue expenditure. A rate is only earmarked in order to pay the expenses incurred during the period over which it is levied. The corporation is required to keep the books in the library in repair, but the section gives them no power to purchase substantial plant and machinery for bookbinding on a large scale.

(1) (1875) L. R. 20 Eq. 544, 549.

(2) [1896] 1 Ch. 418.

C. A. [He referred to the Representation of the People Act, 1918
1931 (7 & 8 Geo. 5, c. 64), s. 42, and the Public Libraries Act, 1892
ATTORNEY- (55 & 56 Vict. c. 53), ss. 4 and 15.]
GENERAL

v.

Cur. adv. vult.

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—

1931. Dec. 16. EVE J. The relator, encouraged by the moral and more tangible support extended to him by his friends in the printing industry, has launched this action, wherein as a ratepayer in the defendant borough, the County Borough of Smethwick, he claims a declaration that it is unlawful for the defendants to expend any part of the general rate fund for the purpose of establishing or carrying on a printing, bookbinding, or stationery works, and an injunction to restrain the defendants from so doing.

Nothing has transpired at the trial to justify a declaration in the terms asked. They suggest that the defendants contemplate applying funds constituting part of the general rate fund in establishing works for and in carrying on there the business of printing and bookbinding and dealing in stationery. The most that the defendants are threatening to do is to make such arrangements as will enable them in the future, on their own premises and with their own staff, to do a larger part of their printing and bookbinding than they have hitherto been able to do. According to the exhaustive evidence of Mr. Chapman, the town clerk, the multitudinous and administrative duties imposed on the defendants involve an annual expenditure of between 5000*l.* and 6000*l.* in stationery, printing, and bookbinding. Having reorganized the system which had existed for many years, under which each department purchased its own stationery, and substituted therefor a centralized arrangement for the purchase and distribution of all the stationery, the defendants followed this up by trying the experiment of employing on their own premises a small staff to do some of the less important printing, and to repair and, if necessary, re-bind books circulated from the public library. Since the early months of the year 1928 the borough council has been considering the question of enlarging the scope of this policy,

and to this end the matter was referred to a special sub-committee for investigation and report. In May, 1928, this body requested the various departmental committees, including the Educational Committee, to instruct their officers to provide information as to the whole of the requirements of their departments for consideration by the committee. These particulars were duly obtained and circulated amongst the members of the committee in January, 1929. The matter stood over for some months, but in July, 1930, the committee reported, and the report which they made will be found on pages 11 and 12 of the agreed documents. I am not going to read it all; the sub-committee reported that they had "arrived at the conclusion that the establishment of such a department is desirable, and, if developed along reasonable lines, is likely to prove an economical proposition. They do not favour the establishment of a department on a large scale at the outset, but are of opinion that it would be more advisable to provide the nucleus of a plant and to engage as manager of the department a man possessed of experience in the purchase of stationery, the control of a printing office and the organisation of supplies." Then the recommendations run: "(1.) That steps be taken to secure the services of a suitable manager. (2.) That the staff at present in the gammeter department, together with such of the machinery in that department as is likely to be of service, be transferred to the basement at the southern end of the Council House. (3.) That as far as possible the whole of the duplicating work for the several departments of the corporation be carried out in the printing department." Then that certain machines should be purchased, that a properly qualified compositor be engaged, and the premises mentioned therein be adapted for carrying on of this new department.

Later on, in October, an estimate was made, from which it appears that the proposals involved a capital outlay of 1000*l.*, and an annual expenditure of some 1426*l.*, and shortly afterwards the recommendations of the committee were duly approved and adopted, and by this time would, no doubt, have been given effect to but for this action.

C. A.

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CORPORATION.

Eve J.
—

C. A. One turns now to see what is the relator's alleged cause
1931 of action. That is to be found in para. 4 of the statement
ATTORNEY- of claim, in which he alleges: "The defendants intend to
GENERAL
v. expend moneys from the general rate fund in and about the
SMETHWICK purchase of printing, bookbinding and stationery plant and
CORPORA- materials, and in and about the establishment and maintenance
TION.
Eve J. and carrying on of a printing, bookbinding and stationery
works. Such expenditure is contrary to the provisions of
s. 140 of the Municipal Corporations Act, 1882, and is ultra
vires and illegal." As I have already intimated, that, in
my opinion, is not an accurate statement of the defendants'
intentions, but this is of only secondary importance in view
of the fact that the argument on behalf of the plaintiff has
proceeded on the footing that the council's intentions as
disclosed in para. 4 of the defence involve an unauthorized
application of the general rate fund. Para. 4 of the defence
does, I think, show that quite clearly. It is in these terms :
"On the 29th October, 1930, the Council duly passed a
resolution adopting certain resolutions of the General Pur-
poses Committee of the Council which had adopted the
recommendation of a sub-committee relating to the printing,
duplicating and stationery work of the Council. The
substance of the recommendation was that the printing,
duplicating and stationery work done by the Council should
be done in one department under the control of a manager,
and that a further plant required for printing purposes costing
approximately 1000*l.* should be acquired." Then there is a
submission: "The defendants submit that they are entitled
out of the general rate fund to acquire the additional plant,
and themselves to do some or all of the printing, duplicating
and stationery work required in the course of the due execu-
tion of their powers and duties." I think that clearly shows
the issue.

The argument in support of the plaintiff's case is put upon
two grounds: first, that the payment is not an authorized
one under s. 140 of the Municipal Corporations Act, 1882;
and, secondly, that even if some part of the expenditure
could be brought within the Act the rest cannot, because

the periodic characteristic of rates raises an implication that they are intended to be used for the discharge of periodic expenses only and not for capital purposes, an implication strengthened by the limited terms of the authority for raising money on the security of the fund. Part VII. of the Act is the material one, and I will deal first with the argument so far as it is based on the periodic nature of the rates. The nature of the general rate fund is determined by s. 139, which is as follows: "The rents and profits of all corporate land, and the interest, dividends, and annual proceeds of all money, dues, chattels, and valuable securities belonging or payable to a municipal corporation, or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this Act (except where and as far as the application thereof is otherwise provided for) shall go to the borough fund." It includes also the income of the proceeds of any ecclesiastical patronage sold by the corporation: see s. 122. Then I turn to s. 144, which is the section empowering the council to make a general rate and assess the contribution thereto. Sect. 144 reads: "(1.) If the borough fund is insufficient for the purposes to which it is applicable under this Act or otherwise by law, the council shall from time to time estimate, as correctly as may be, what amount, in addition to the borough fund, will be sufficient for those purposes. (2.) In order to raise that amount, the council shall, subject to the provisions of this Act, from time to time order a rate, called a borough rate, to be made in the borough." Then s. 149 enacts that: "All sums levied in pursuance of the borough rate shall go to the borough fund; and, subject to the foregoing provisions of this Part, the same shall be applied to all purposes to which the borough fund is applicable under this Act, or otherwise by law." Sect. 143 says any surplus of the general rate fund, after providing for the purposes to which the fund is applicable under the Act, is to be applied for the public benefit of the inhabitants and the improvement of the borough. Sect. 143, sub-s. 1, is in these terms: "If the borough fund is more than sufficient for the purposes to which it is applicable under

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this Act, or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough.” Then there is a sub-section which I think I need not read. In Part V. of the Act, which deals with corporate property and liabilities, is s. 106, which confers a power to borrow at interest with the approval of the Minister of Health on the security (inter alia) of the general rate fund, such sums as the council from time to time think requisite for the purchase of land or for the building of any building which the council are authorized by the Act to build. That, it is to be observed, is a special power to borrow on the security of this fund for particular purposes. Then finally by s. 140 the general rate fund is declared to be applicable to and charged with the several payments specified in the Fifth Schedule, of which those specified in Part I. of the Schedule may be made without order of the council and those specified in Part II. may not be made without such order. Although the general rate fund is contributed to mainly by the general rate and payments of a recurrent nature, such as rents and profits, interest, dividends and annual proceeds of investments, it is not wholly made up from those sources; for example, fines and penalties are to go to its credit, and ss. 106 and 143, as also do some of the purposes enumerated in Sch. V., contemplate the application of the funds which are inconsistent with their being dedicated solely to the purposes of a recurring and periodic character.

Looking at all the relevant parts of the Act, I am unable to accept the view urged on the part of the relator that the fund is so stamped with the characteristic of periodicity as to prevent its application to purposes not having that characteristic. If the expenditure contemplated on this occasion is otherwise within Part II. of Sch. V., I do not think the fact that it involves expenditure of a capital nature out of the fund makes it illegal. It may be that such expenditure ought to be provided out of that part of the fund which represents contributions from other sources than rates, that is to say, from rents and profits, interest and dividends,

finances and penalties, and the statement was made at the Bar on instructions that there is a reserve of contributions arising from these other sources ample to meet the requirements of the present proposals.

The conclusion that the proposed expenditure would not involve an improper use of the general rate fund would appear to dispose of the relator's case, in that his cause of action is not that the expenditure of money in printing, bookbinding, or stationery is ultra vires and unauthorized by s. 140, but that the proposed division of the work between home and outside labour would involve an illegal use of the particular fund. When this allegation is disposed of and the ultra vires charge negatived there does not appear to be anything left in the action, though, if it be necessary to determine the question, I hold that the expenses relating to printing, bookbinding, and stationery are necessarily incurred in carrying the Act into effect. The result is that the action fails and must be dismissed with costs, and inasmuch as this is a public authority the costs will be as between solicitor and client.

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The plaintiff appealed. The appeal was heard on February 3 and 4, 1932.

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Montgomery K.C. and *H. J. Astell Burt* for the appellant referred to the following additional authorities: *Attorney-General v. De Winton* (1); *Tynemouth Corporation v. Attorney-General* (2); *Roberts v. Hopwood* (3); *Fenwick v. East London Ry. Co.* (4); and *Morris v. Tottenham and Forest Gate Ry. Co.* (5)

Gavin Simonds K.C. and *Andrewes-Uthwatt* for the respondent corporation were not called upon.

LORD HANWORTH M.R. This action was brought by His Majesty's Attorney-General as the guardian of public rights

(1) [1906] 2 Ch. 106.

(3) [1925] A. C. 578.

(2) [1899] A. C. 293.

(4) L. R. 20 Eq. 544.

(5) [1892] 2 Ch. 47.

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on the relation of Benjamin Thomas Hill against the Mayor, Aldermen and Burgesses of the County Borough of Smethwick. The defendants are a corporation who rule over, I think, a population of some 90,000 persons, and it is said in the statement of claim that: "The defendants have passed a resolution providing for the establishment of a printing, book-binding, and stationery works for the purpose of executing all printing, bookbinding, and stationery work required by them," and that they intend to expend moneys from the general rate fund in and about the purchasing of plant for that purpose. It is claimed by the plaintiff that such expenditure is contrary to the provisions of s. 140 of the Municipal Corporations Act, 1882. The defendants, on the other hand, say that certain duties fall upon them which involve their incurring certain expenses and making certain payments in the exercise of their powers, that those expenses fall upon and the payments are made by them out of the general rate fund, and that as a necessary incident to the due performance of their powers they require a considerable amount of printing, bookbinding, and stationery work to be done. They say further that after consideration they have come to the conclusion that it will be to the advantage of the economical and satisfactory carrying out of their duties that they should establish a plant for printing purposes costing round about 1000*l*. It is to be observed that the claim of the plaintiff is that the defendants have passed a resolution providing for the establishment of printing, bookbinding, and stationery works. It would seem from the evidence that those words must be given a limited meaning, because taken simpliciter they would appear to indicate an intention to start a printing establishment for the purpose of profit.

I turn, therefore, to the actual documents before the Court, which show what the defendants' intention is. It appears that as long ago as May, 1928, a report was made by a sub-committee appointed by the defendants to investigate the question of establishing a printing department, and later it was resolved: "That having considered such report this sub-committee have come to the conclusion that such a

department is desirable and would in their opinion be profitable and conducive to better service to the corporation," and it was decided to ask the committee to instruct their officers to provide information as to the requirements of their various departments. We are told that there are no less than thirteen departments. They have, as the catalogue of them shows, necessarily to issue a number, I was going to say a terrible number, of notices, documents and the like. These departments are tabulated by the town clerk, and relate to such matters as engineering, public health, public accounts, gas undertaking, education, public library, weights and measures, local taxation, licences, and fire brigade. All of these require bound books of account; and other books are required, such as rate books, demand books, valuation lists, and so on. Numbers of records also have to be kept, which cannot be done merely on loose sheets. I say this to give some indication of the nature of the work which falls to be carried out by the defendants. Hitherto the expenditure by them on the printing, and as I gather the books as well, is something like 5000*l.* to 6000*l.* That I think is really rather under the mark, because another 1000*l.* must be added for binding books of account and library books, making a total of something like 6000*l.* or 7000*l.* per annum. This committee went into the matter and did get information from the other departments, and ultimately they made a report dated July 18, 1930, in which they came to the conclusion that the establishment of a printing and stationery department was desirable and would, if developed along reasonable lines, be likely to prove an economical proposition. They say further: "that it would be more advisable to provide the nucleus of a plant and to engage as manager of the department a man possessed of experience in the purchase of stationery, the control of a printing office and the organisation of supplies. Your sub-committee find that there is in the several departments of the Council duplicating equipment which in their opinion should be transferred to the new printing department, where the necessary duplicating could be more advantageously carried out, and, if

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C. A. necessary, supplemented as the need arises. They are of
1932 opinion that when the suggested printing apparatus is
ATTORNEY- installed it will be necessary for a properly qualified compositor
GENERAL to be appointed to work under the direction of the manager ” ;
v. so that the works, if necessary, could be enlarged or developed
SMETHWICK as the needs of the corporation grew. For the purpose they
CORPORA- suggested the purchase of a certain amount of machinery, one
TION. machine being capable of printing full-size posters. That
Lord Hanworth recommendation came up on report. The particulars of the
M.R. estimated annual cost was a sum of about 1400£., which
— covered the costs of employing a manager, a compositor, the
machine man, the girl feeder, three gammeter operators ; and
added to that there would have to be the initial outlay on
machinery. Finally the council approved this report, and
recommended that the proposals should be carried into effect.
There is therefore evidence before the Court that these
defendants have come to the conclusion that as an economical
proposition it would be wise to provide a printing and
stationery department for producing in large quantities the
documents required for the work of the defendants. It is
admitted that the corporation must engage in the issue of a
large amount of documents which must be copied and repro-
duced in large numbers. It is not denied that if they had a
number of Roneo machines for the purpose of multiplying
the documents they produce, that would be quite in order. It
is not denied that they might purchase and use a number of
typewriters which could produce a number of copies at the
same time. What is said is that the creation of a printing
and stationery department is really an incursion into
municipal trading, and is not necessary for carrying out the
Act. Eve J. had the matter before him, and he tabulates
the arguments which are urged on behalf of the plaintiffs in
the following way : “ First, that the payment is not an
authorized one under s. 140 of the Municipal Corporations
Act, 1882 ; and, secondly, that even if some part of the
expenditure could be brought within the Act the rest cannot
be, because the periodic characteristic of rates raises an
implication that they are intended to be used for the

discharge of periodic expenses only and not for capital purposes."

I turn, therefore, to consider whether or not the defendants in their discretion are entitled to engage in this enterprise, as I will call it. It seems quite clear from the facts I have recounted that the defendants have exercised their discretion and have taken into account the question whether or not this is a useful and economical departure. Tempora mutantur, and as time goes on it is possible that every body of this nature will adopt what are called modern methods to deal with the mass of material that has to be issued by them in the form of documents and notices.

The powers of this corporation, although incorporated by charter, are stated by the terms of the Act of 1882, which none the less bind them; and s. 140 provides that: "The borough fund shall be applicable to and charged with the several payments specified in the Fifth Schedule." There are powers for bringing up an improper payment or order for payment of money for consideration by the Court, if the corporation go outside the powers conferred by the statute; and in the Fifth Schedule are a number of authorized payments, some of which may be made without special order while others may not. These authorized payments cover a large field of the duties and activities with which the council are charged. It is said that this enterprise, as I have called it in order to give it perhaps the worst name that could be attached to it, is one which is not within the Schedule. It is, as I say, admitted that there must be a great deal of reproducing of documents by the corporation, and we have the words in the Schedule: "all other expenses, not by this Act otherwise provided for, necessarily incurred in carrying this Act into effect." I do not think it was argued, nor could it be argued, that part of the expenses necessarily incurred in carrying the Act into effect was not the issue of the notices and documents spoken to by the town clerk.

The question what interpretation ought to be given to words of this nature is really not in doubt. It has often been considered whether or not corporate bodies tied by the

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terms of an Act of Parliament were going outside these powers and engaging in some collateral form of activity or business not originally contemplated when their statutes were passed by Parliament. I need only refer to *Attorney-General v. Great Eastern Ry. Co.* (1) and the well known judgment of James L.J. in that case. He deals with the question of a railway company going outside its statutory powers and, perhaps for its own purposes, taking part in the business of a colliery in order to secure commodities required for the purposes of its line. He says (2): "So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other."

When that case went to the House of Lords (3) Lord Selborne said (4), after referring to *Ashbury Ry. Co. v. Riche* (5): "it appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*." Lord Blackburn also says (6): "I quite agree with what Lord Justice James has said on this first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited."

The same question as to the powers of a corporation whose duty it was to carry out an Act of Parliament and whose powers were limited by the Act, came before the House of Lords in *Deuchar v. Gas Light and Coke Co.* (7) Lord Cave says (8): "There is no dispute as to the legal propositions

(1) 11 Ch. D. 449.

(2) Ibid. 484.

(3) 5 App. Cas. 473.

(4) Ibid. 478.

(5) (1875) L. R. 7 H. L. 653.

(6) 5 App. Cas. 481.

(7) [1925] A. C. 691.

(8) Ibid. 695.

which are to be applied in this case." Then he refers to Lord Watson's speech in *Baroness Wenlock v. River Dee Co.* (1)—namely: "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." Then he quotes again the passage which Lord Selborne and Lord Blackburn had quoted from James L.J.'s judgment in *Attorney-General v. Great Eastern Ry. Co.* (2) Those words really give a guide, because, although the actual facts were different in both the *Gas Light and Coke Co.*'s case (3) and the *Great Eastern Ry. Co.*'s case (4), the Courts were considering in both cases what were the limitations imposed upon a corporation or statutory company by the terms of the Act of Parliament; and in the present case there is no question that this borough council have got to perform the duties with which they are charged under the Municipal Corporations Act, 1882, and are limited in their powers by that Act, not less because they were incorporated by charter. We have, therefore, the direction of the House of Lords that if the enterprise we are considering is incidental to or consequential upon those things which the Legislature has authorized, it ought not to be held to be ultra vires.

In the present case, the first question is what is wise, what is prudent. I agree with Mr. Burt that the corporation could not start a printing business in the sense in which those terms would generally be understood. They cannot cater for the public or endeavour to trade and make a profit. But is it to be said, on the other hand, that they must not have any printing done on their own premises? If that can be done and it saves the ratepayers' money, is not that wise? This is quite a different case from *Roberts v.*

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(1) 10 App. Cas. 354, 362.

(3) [1925] A. C. 691.

(2) 11 Ch. D. 484.

(4) 5 App. Cas. 473.

C. A. *Hopwood* (1), the decision in which is beside the point. It appears from the facts that the corporation have exercised their discretion within the area entrusted to them, and under those circumstances it seems impossible to hold that they are not authorized to take the further steps which prudence dictates and modern mechanism renders possible.

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The second point taken by the appellant is that, although that may be so, they are still not justified in making a capital outlay for machinery out of the general rate fund. It must always be a difficult question to decide what is properly attributable to capital and what to revenue. There is in this case no determination by an auditor that the expense to be incurred is wrong. But it is said that if regard be had to the section and Schedule in question it will be found that the general rate is, broadly speaking, to be devoted to current and periodic expenses, and not to expenses of a capital nature. That may be true, broadly speaking; but, as Romer L.J. pointed out, there are certain items in the Fifth Schedule, Part II., which it is difficult to attribute to revenue only, such as No. 3: "The expenses of providing, furnishing, maintaining, or improving the corporate buildings, including the justices room (if any), and the necessary expenses of that room." (8.) "The expenses of and incidental to the division of a borough into wards or the alteration of wards." (10.) "The expenses of and relating to a charter of incorporation for a borough, and of and relating to all elections acts and proceedings under the charter." Those items, at least as to some part of them, involve a capital expenditure. I do not think, therefore, that it can be said that the Schedule contemplates expenditure out of the general rate fund in respect only of matters attributable to revenue.

It is said that when a capital expenditure is authorized, a power to borrow in respect of it will always be conferred, as in the case of sanitary works. So too our attention was called to the power to borrow for municipal buildings conferred by s. 120. I do not think that this test is accurate or indeed applicable. There may be powers to borrow for a great

number of matters that are capital outlay, but having regard to the terms of the Fifth Schedule it is impossible to say that capital expenditure out of the general rate fund is excluded, at any rate in small matters, and after all, for such a corporation as this the expenditure contemplated is not very large. This second contention that the expenditure in question cannot be made out of the general rate fund, because it is in the nature of capital expenditure, therefore fails also.

For these reasons it appears to us that the learned judge came to a right conclusion, and this appeal must be dismissed with costs.

LAWRENCE L.J. I agree.

ROMER L.J. I agree. I only desire to add this. For the purposes of ascertaining whether any particular matter falls within category No. 12 of Part II. of the Fifth Schedule to the Municipal Corporations Act, 1882, it is necessary to determine two distinct things. The first thing to be determined is whether the matter in connection with which expenses are about to be incurred is within the power of the corporation, or whether it is ultra vires the corporation. For the purposes of determining that question we must apply the principles enunciated by James L.J. and Lord Selborne in *Attorney-General v. Great Eastern Ry. Co.* (1) If that question be determined in favour of the corporation and the carrying out of the particular enterprise be found to be intra vires the corporation, then the second question, which I conceive to be an independent question, arises whether the expenses being incurred are unnecessarily large. In other words I think that the word "necessarily" in category 12 does not apply to the exercise of the power itself, but to the expenditure incurred in connection with the exercise of that power.

Appeal dismissed.

Solicitors: *Scatliffs; Sharpe, Pritchard & Co., for F. Chapman, Town Clerk, Smethwick.*

(1) 11 Ch. D. 484; 5 App. Cas. 478.

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In re PARK.PUBLIC TRUSTEE *v.* ARMSTRONG.

[1931. P. 873.]

Will—Power of Appointment—Power to Donee to appoint Income of Fund to any one “other than herself”—Power valid.

A power to a donee to appoint the income of a fund to any person, “other than herself,” or persons or charitable institution or institutions, is valid.

A testator gave his residuary estate to his trustee in trust to pay the income thereof to any person, “other than herself,” or persons or charitable institution or institutions, and in such shares and proportions as his sister, J. A., should from time to time during her lifetime direct in writing, and from and after her decease in trust as to both capital and income for the Imperial Merchant Service Guild for the benefit of their stress fund absolutely:—

Held, that the trust was a valid and effectual trust, and that the power conferred thereby on J. A. was a valid power, exercisable by her.

ADJOURNED SUMMONS.

By his will, dated December 31, 1925, the testator appointed the Public Trustee sole executor and trustee thereof, and, after a specific devise and bequest to his sister, the defendant Jane Armstrong, he gave, demised and bequeathed all the rest, residue and remainder of his real and personal property unto his trustee upon trust for sale and conversion and out of the proceeds of such sale and conversion to pay his funeral and testamentary expenses and debts. The testator then directed his trustee in the first place to appropriate and set apart the sum of 3000*l.* as therein mentioned, and secondly, to appropriate and set apart a further sum of 1300*l.* as therein mentioned, and thirdly, he directed his trustee to pay certain pecuniary legacies free of legacy duty as therein mentioned, and as to the ultimate balance of the proceeds of sale and conversion, the testator directed his trustee to invest the same upon such security or securities as he should select, and to stand possessed thereof and of the investments for the time being representing the same in trust to pay the annual income to arise therefrom to such person (other than herself)

or persons or charitable institution or institutions and in such shares and proportions as the defendant Jane Armstrong should from time to time during her lifetime direct in writing, and from and after her decease in trust as to both capital and income (including any accrued income which might not have been allocated) for the Imperial Merchant Service Guild for the benefit of their stress fund absolutely.

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The testator died on August 6, 1927.

A question arose whether the trust or power conferred on the defendant, Jane Armstrong, was valid and effectual, and this summons, taken out by the trustee, raised the question of its validity.

The defendants, Jane Armstrong, Zoe Park, the testator's widow, and Marie Park, his niece, were interested in any undisposed of estate of the testator. The defendant, Charles Kingsley Mitchell, was the treasurer of the Imperial Merchant Service Guild.

Wilfrid Hunt for the plaintiff. The difficulty is raised by the use of the words, "other than herself."

G. D. Johnston for Jane Armstrong. This is a perfectly good power of appointment, although it cannot be said that it is a general power: *In re Byron's Settlement*. (1) It is, however, quite clear who can take if the power is exercised: anybody but the donee herself. A dictum of Lord Haldane in *Attorney-General v. National Provincial Bank* (2) will be cited against me, but Lord Haldane was there considering an entirely different point. The general principles in respect of powers are well dealt with by Sargant J. in *In re Hughes*. (3) The only question is whether the Court can ascertain who is within the power and who is not. If it can ascertain who is within the power, then it is good. There can be no doubt of its ability to do so in the present case.

[He also cited *In re Combe*. (4)]

Andrewes-Uthwatt for the defendant Mitchell. This is a plain attempt by the testatrix to delegate her power of making

(1) [1891] 3 Ch. 474.

(2) [1924] A. C. 262, 268.

(3) [1921] 2 Ch. 208, 212.

(4) [1925] Ch. 210.

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 ARMSTRONG. a will to the donee of the power. It is not a general power, for a general power must include a power to the donee to appoint to him or herself, and is therefore equivalent to ownership. Neither is it a special power, no persons or particular class being designated. In *Vezey v. Jamson* (1) it was held that the power was too vague, and that the trustees could not take themselves. If the power is not valid, then the fund vests in the stress fund of the Imperial Merchant Service Guild at once.

Stafford Crossman for the Attorney-General. In *Jarman on Wills*, 7th ed., vol. ii., p. 763, a power similar to the present one is considered, and is said to be valid. In *Drake v. Attorney-General* (2) the House of Lords held that such a power was valid. It is a material point that the donee cannot make the fund part of her assets.

[He cited *O'Grady v. Wilmot*. (3)]

A. T. N. Bellamy for Marie Park. If a testator leaves the disposition of any property or fund to a third party the bequest is void, and the property or fund passes as on an intestacy: *Houston v. Burns*. (4) That applies in the present case.

Waite for Zoe Park. This case is entirely covered by *Houston v. Burns* (4) and *Attorney-General v. National Provincial Bank*. (5) The whole gift is void.

Nov. 27. CLAUSON J. [His Lordship stated the facts, and continued:] On the true construction of this clause it seems to me to be an absolute gift to the stress fund of the Imperial Merchant Service Guild, with the proviso that during her life Jane Armstrong may by writing, to such extent as she thinks proper, divert any part of the income to any object other than her own personal use.

Now Jane Armstrong is not a trustee. If she refused to act in the matter the Court could not appoint another person to act in her place.

(1) (1822) 1 Sim. & St. 69.

(3) [1916] 2 A. C. 231.

(2) (1843) 10 Cl. & F. 257.

(4) [1918] A. C. 337.

(5) [1924] A. C. 262.

It is clearly settled that if a testator creates a trust he must mark out the metes and bounds which are to fetter the trustees or, as has been said, the trust must not be too vague for the Court to enforce, and that is why a gift to trustees for such purposes as they may in their discretion think fit is an invalid trust; there are no metes and bounds within which the trust can be defined, and unless the trust can be defined the Court cannot enforce it. The trust here created seems to me to be perfectly definite and marked out by definite metes and bounds. If Jane Armstrong designates a definite object in writing, that will be the object to which the trustees or the Court will apply the income: in so far as there is no such direction the charitable gift to the stress fund of the Imperial Merchant Service Guild will operate. A testator must define for himself the trusts which he creates: he must not leave it to his trustees to define them: he cannot leave it to his trustees to make a will for him, and that is, I conceive, what Lord Haldane means when he says in *Attorney-General v. National Provincial Bank* (1) that a testator cannot leave it to some one else to make a will for him. But here the testator has, as I have said above, marked out the trust quite definitely and left nothing indefinite about the trustee's duties.

It was argued, however, that the clause in this will which gives Jane Armstrong power, as I construe it, to divert the income during her lifetime to any object other than her own personal use, was bad as an attempt pro tanto to leave it to Jane Armstrong to make a will for the testator, which in the language used by Lord Haldane cannot be done. This argument, however, fails to pay due regard to the well settled principle, which Lord Haldane obviously did not intend to question, that a testator may by will confer on any person a power to appoint to whomsoever such person pleases, i.e. (see Sugden on Powers, p. 394), a general power, and also may confer on any person a power to appoint with a restriction—namely, that the appointees are to be among certain objects designated in the will, i.e. (see Sugden, p. 394), a particular

(1) [1924] A. C. 262, 268.

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power. To this the ingenious answer was suggested that the creation of a general power is lawful, because it is a mere equivalent to conferring on the donee the property in the subject-matter of the power, that the creation of a particular power is lawful if, but only if, there is a defined class of objects among whom the donee of the power is given a power of selection; that in the present case the testator has not given Jane Armstrong a general power [for it is of the essence of a general power that the donee may exercise it in his own favour, and thus in effect obtains through it property and not mere power] neither has the testator in the present case created a particular power, for there are no objects designated in the will among whom or which the donee is to select; accordingly, so the argument proceeds, the so-called power in the present case is no such power as can be recognized by the Courts as a power which can validly be created by a will; the provision in question is, therefore, so it is said, a mere attempt to delegate the testator's will making power to Jane Armstrong and, pro tanto, inadmissible.

The argument appears to me to overlook the fact that the division of valid legal powers into general and particular is not exhaustive. As is pointed out in *Jarman on Wills*, 7th ed., vol. ii., p. 763, there is a third class of powers where the donee can appoint to any one with certain exceptions, e.g., an exception, as in the case before me, of himself, or an exception of named persons or classes of persons. I have not been referred to any case, apart from the present one, where the object excepted was the donee, but there is the highest authority in the case of *Platt v. Routh* (1), reported in the House of Lords as *Drake v. Attorney-General* (2), for recognizing the validity of a power created by will for the donee to appoint to any one except certain persons named or indicated, and I am not astonished to find that the validity of a similar power was assumed in *In re Byron's Settlement*. (3) I know of no authority to justify me in holding that a power to A. B. to appoint to any object except himself is invalid, while a

(1) (1840) 6 M. & W. 756.

(2) 10 Cl. & F. 257.

(3) [1891] 3 Ch. 474.

power to A. B. to appoint to any object except X. Y. is valid, and I have the opinion of Mr. Jarman and his learned editors to support me in refusing so to hold.

For these reasons I hold that the trust is a valid and effectual trust and that the power conferred thereby on Jane Armstrong is a valid power exercisable by her.

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Solicitors: *Gregory, Rowcliffe & Co., for Paisley, Falcon, Skerry & Highet, Workington; Jaques & Co., for Miller, Taylor & Holmes, Liverpool; The Treasury Solicitor.*

P. J. B.

In re GEORGE DUDELL (DECEASED).

FARWELL
J.

ROUNDWAY *v.* ROUNDWAY.

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Feb. 3, 4.

[1931. D. No. 1384.]

Will—Joint Will—Residuary Devise and Bequest subject to Life Tenancy as A and B shall by Will direct and appoint—Joint Will by A and B making Appointment—Death of A during Life Tenancy—No Revocation of Joint Will—Effect of Joint Will as an exercise of Power of Appointment.

A testator devised and bequeathed the residue of his real and personal estate to his wife for life and after her death to his son and daughter for their sole and separate use during the term of their natural lives and after their decease to such persons and to such ends and purposes as the son and daughter should by will appoint and in default of appointment to his right heirs for ever. The brother and sister executed a joint will. The brother died in November, 1917, having by his separate will confirmed the joint will, and the joint will, the separate will, and a codicil thereto were admitted to probate as being his last testamentary disposition. The mother died on August 8, 1931. The question then arose whether the appointment by the joint will was a good exercise of the power of appointment by the brother and sister:—

Held, that a joint appointment by will could be made by two persons; that, if the sister did not revoke the joint will, then upon her death and the joint will being admitted to probate as part of her testamentary dispositions it would be an effective exercise of the power of appointment, and would comply with the requirements in the will of the father.

ADJOURNED SUMMONS.

This summons raised the question as to the effect of a joint will, purporting to be made in exercise of a power of

FARWELL J. appointment by will given to a brother and sister by the will of their father, and whether it was a good exercise of the power.

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ROUNDWAY v. — George Duddell, by his will dated October 7, 1881, devised and bequeathed the residue of his real and personal estate upon trust for his wife for her life and after her death in trust for his two children, William Du Bois Duddell and Blanche Gladys Du Bois Duddell, "for their sole and separate use during the term of their natural lives, but so nevertheless that the said William Du Bois and Blanche Gladys Du Bois shall not have power to deprive himself or herself of the growing rents and profits by way of anticipation, and after the decease of the said William Du Bois and Blanche Gladys Du Bois to convey and assign the lands tenements and premises to such persons and to such ends and purposes as the said William Du Bois and Blanche Gladys Du Bois shall by will direct and appoint, and in default of such appointment to my right heirs for ever."

George Duddell died on December 30, 1887, without having revoked or altered his will, and leaving his wife Frances Kate Duddell and his two children William Du Bois Duddell and Blanche Gladys Du Bois Duddell him surviving, and the will was duly proved.

After the death of George Duddell questions arose as to the effect of the residuary devise and bequest after the death of the widow, and in 1904 application was made to the Court to obtain a decision, but Byrne J., before whom the matter came, was unwilling to determine it, on the ground that it was a future question. The brother and sister, who were both of full age, then made between themselves certain arrangements to provide as far as possible for the future. Such arrangements provided for a deed of mutual covenant and for the execution by the brother and sister of a joint will exercising the power of appointment given to them by the will of George Duddell. By the deed of covenant dated April 26, 1904, and made between William Du Bois Duddell of the one part and Blanche Gladys Du Bois Duddell of the other part, it was mutually covenanted and agreed that the brother and

sister should and would as from the death of the widow and during the residue of the joint lives of the brother and sister and the life of the survivor of them "stand possessed of all income of the residuary real and personal estate of George Duddell and of the proceeds of sale and conversion of such real and personal estate and of the investments moneys and property for the time being representing such real and personal estate and proceeds of sale respectively to which they he or she are is or may become entitled under the will of George Duddell in trust in equal shares for the said William Du Bois Duddell and Blanche Gladys Du Bois Duddell during their joint lives and after the death of either of them in trust as to one moiety of the said income for the survivor of them and as to the remaining moiety of the said income in trust for such person or persons for such purposes and in such manner as whichever of them shall first die shall at any time by any deed or deeds revocable or irrevocable or by his or her separate will or codicil appoint and in default of and subject to any such appointment in trust for the legal personal representatives or representative of whichever of them shall first die." At the same time the brother and sister, also on April 26, 1904, executed a joint will, exercising the power of appointment given to them by the will of George Duddell, and by such appointment they directed that the residuary estate should be held after the death of their mother upon the same trusts as were declared by the deed of covenant.

William Du Bois Duddell made a separate will, dated May 13, 1904, and thereby revoked all testamentary dispositions made by him other than by the joint will, and confirmed the joint will and appointed and bequeathed unto his sister for her separate use without power of anticipation during any coverture all income derived from the residuary real and personal estate of George Duddell, to which, in the event of his predeceasing his sister, his executors or administrators should during the residue of the life of his sister become entitled as part of his personal estate under and by virtue of the joint will and the deed of mutual covenant.

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FARWELL William Du Bois Duddell made a codicil dated June 7,
J. 1917, and thereby gave all the residue of the property
1932 belonging to him at his death or over which he would have
DUDELL, a general power of appointment or disposition by will (other
In re. than any power of appointment, whether joint or separate,
ROUNDWAY vested in him by the will of George Duddell) unto his mother
v. (then Frances Kate Smithers) absolutely, but if she pre-
ROUNDWAY. deceased him then he gave the same to his sister absolutely,
and continued: "in all other respects I confirm the joint
will dated April 20, 1904, and re-signed on April 26, 1904, of
myself and my sister and my said will dated May 13, 1904."

William Du Bois Duddell died in November, 1917, and the Probate Court admitted to probate as his last testamentary disposition the joint will, the separate will, and the codicil. Blanche Gladys Du Bois Duddell married Edward Murray Colston, who became Baron Roundway, and she was now Blanche Gladys Du Bois Baroness Roundway. She had not attempted to revoke the joint will.

The mother, Frances Kate Smithers, died on August 8, 1931, having by her will appointed Lady Roundway executrix and sole residuary legatee.

Upon the death of the mother various questions arose as to the effect of the will of George Duddell, and this summons was issued by the Settled Land Act trustees, of George Duddell's will for the decision of these questions, but the only point which requires a report was as to the effect of the joint will, and whether it was a good exercise of the power of appointment given to the brother and sister by the will of George Duddell.

Danckwerts for the plaintiffs.

Fergus Morton K.C. and *Stafford Crossman* for Lady Roundway.

C. D. Gray for the heir at law and next of kin of George Duddell.

Wilfrid Hunt for the executors of William Duddell.

Overton for the trustees of Lady Roundway's marriage settlement.

FARWELL J. This question I have now to determine is, FARWELL J.
as it seems to me, of considerable interest from a legal point
of view, and has the merit or otherwise of being, so far as I
know, a novel point. Putting it very shortly, the question
is whether, if a power of appointment by will is given to two
persons, that power is exercisable at all, and if so how can
it be exercised. [His Lordship then read the power of
appointment in George Duddell's will, and continued:]
The will now in question is dated April 26, 1904, and
it purports to be a will made by the brother and sister.
It begins: "We, William Du Bois Duddell and Blanche
Gladys Du Bois Duddell hereby revoke all joint wills
and testamentary dispositions heretofore made by us and
declare this to be our last joint will which we make this
26th day of April, 1904." Then it proceeds to exercise the
powers of appointment given to the two of them by the
will of their father. On the death of William Duddell,
the brother, the Probate Court admitted to probate, as his
last testamentary disposition, the joint will, a separate will,
and a codicil thereto, and, as I understand it, those three
documents together were, and I must treat them as being,
for all purposes the final disposition of his property by the
brother. At present Lady Roundway has not, so far as I
know, attempted in any way to revoke the joint will.
Whether she could make a will which would operate as a
good revocation of that joint will, so far as it purports to
exercise the power of appointment, I am not prepared to
say: the question has not arisen, and it would be quite
wrong for me to express any opinion upon it. If when
Lady Roundway dies it is found that she has attempted to
revoke the joint appointment, it may become necessary to
determine what the effect of that may be; but at present
that question does not arise and I am not determining it.
What I have to consider is whether, assuming that Lady
Roundway makes no attempt to alter or revoke the joint
will, so far as it purports to exercise the power of appointment,
the result will be that on her death the property will go in
accordance with the appointment contained in the joint will.

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FARWELL J. I think that it is useful to begin by looking at the definition of "will" which is to be found in the Wills Act. That definition is in these terms—I need not read the whole of it —in the first section: "The word 'Will' shall extend to
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DUDELL, *In re.*
ROUNDWAY a testament, and to a codicil, and to an appointment by will,
v.
ROUNDWAY, or by writing in the nature of a will, in exercise of a power,
— and also to a disposition by will or testament or devise"—and then there are other matters. Therefore one starts with this, that in order that this appointment may be well made it has to be effected by a writing in the nature of a will to operate as an exercise of the power. Moreover, in order that a power may be validly exercised, it is now established beyond all question that all essentials which are required by the terms of the appointment must be complied with. Is it then possible for a person to give to two persons a power to appoint jointly by will over any property? That a power may be given to two or more persons to appoint by deed jointly is, of course, unquestionable, and equally a power to appoint by will given to one person creates no difficulty, for in such a case, if the power is exercised by will, then on the death of the appointor the will operates as an execution of the power and the property passes accordingly. But in the case of a joint will, on the death of the first of the two joint appointors, the property which is subject to the power does not pass at all, and it may be (though I do not decide this) that, if the survivor of the two were to revoke or seek to revoke the joint appointment, the result would be that there would be no effective appointment at all. Moreover, in any case the joint will on the death of the first of the two appointors cannot operate as an exercise of the power so as to pass any property or interest in the property at all. That I think is clear. There would be no divesting of the estate in default of appointment and revesting, as for example would be the case where an appointment is made to take effect at the termination of a life interest, which is still subsisting. In a case of that kind the appointment, although it does not entitle the appointee to immediate possession of the property by reason of the existing life interest, does

operate there and then to divest the vested interest in default of appointment, and to give the person in whose favour the appointment is made a vested interest. The joint will on the death of the first of the two appointors cannot have any such operation, but none the less the document is, in my judgment, rightly admitted to probate as being part of the dispositions which the testator, the first appointor, has made of his own property and of the property over which he has a power of appointment. On the death of the second of the appointors, assuming that no attempt has been made by the survivor to revoke the joint will, the joint will will again be admitted to probate, together with any other will that the second appointor has made, as being together the dispositions of that person's property and of the power of appointment given to that person. If I can treat the joint will as being a joint appointment by will by the two persons, then on the death of the survivor, for the first time the property will vest in the appointees. Now, am I justified in holding that the effect of that operation—that is to say, the will made jointly, proved on the death of the first appointor, proved again on the death of the second appointor, and then taking effect—am I justified in saying that that is an effective appointment by will by the two named appointors? There is, as I have said, no direct authority upon this at all; but Mr. Morton has very rightly called my attention to one sentence in a judgment of Lord Mansfield. It is the case of *Darlington (Earl) v. Pulteney*. (1) In that case the question was whether a power to appoint by deed was well exercised by a will. Perhaps it is not surprising that the learned judge decided that the will was not a good exercise of the power, and so far as the decision is concerned it has no bearing on the question that I have to consider, but there is this passage in the judgment. The learned judge says: "The first requisite which the power prescribes is impossible to be performed by will, which is, that it shall be by joint deed of Lord Bath and his son. Now there cannot be a joint will." That passage is quoted verbatim by Mr. Chance in

(1) (1775) 1 Cowp. 260.

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FARWELL J. his most learned work on Powers, and treated by him as being a statement of the law ; but he does not discuss the matter at all, nor does he refer to any other authorities for the proposition. I cannot think that Lord Mansfield, when he made that statement, had in mind at all the sort of question that I have to consider, nor is the statement in one sense quite accurate at the present time, because in my judgment it is plain on the authorities that there may be a joint will in the sense that if two people make a bargain to make a joint will, effect may be given to that document. On the death of the first of those two persons the will is admitted to probate as a disposition of the property that he possesses. On the death of the second person, assuming that no fresh will has been made, the will is admitted to probate as the disposition of the second person's property, and together they operate to dispose jointly of the property in the two of them, and to that extent it is not quite accurate to say that a joint will is an impossibility. But however that may be, I do not think that it would be right for me to take one sentence out of the judgment, even of so great a judge, in a case in which he was not considering the question which I am considering, and treat that as being authority in this particular case. The question really is whether on the true construction of this particular power there will be, on the death of the lady, such an appointment as the will of the testator directs. I am assuming that on the death of Lady Roundway it will be found that the joint will remains unaltered, and that there has been no attempt by her to alter or revoke it. On that assumption, it appears to me that, when the will is admitted to probate as a part of the disposition of her property and her powers, there will be a direction and appointment by the two named persons by will in a particular way, and I cannot myself see why such a direction and appointment is not within the words which the testator himself has used. He has said that the property shall go as William and Blanche shall by will direct or appoint. On the death of Lady Roundway, on the assumption I have made, there will be a direction by will of the two

named persons, and I, myself, cannot see why that will not operate as a good appointment within the meaning of the testator's will. If I am right in having construed this bequest in this will as giving these two persons an interest in the estate as joint tenants, then the effect must be that the power of appointment is a power of appointment by both parties, and I am bound, as it seems to me, to give effect if I can to what the testator has provided. If I come to the conclusion that, because this is a power to the two of them to appoint by will, therefore this power can never be exercised, I am not giving any effect to what was the plain intention of the testator. I should of course be driven to that conclusion if I thought that the testator had sought to do something that the law did not permit, but, as I have said, that is not the conclusion to which I have come. This seems to me to be a case where I have to see whether there will be on the death of Lady Roundway an appointment by will by these two persons, and, in my judgment, the joint will will then be such an appointment. It is quite true, as pointed out by Mr. Gray, that on the death of William no property passed, no property vested; that this appointment could not have any immediate effect whatsoever; that it was an appointment which was then inchoate, and whether it would be effective to pass the property or not might depend on circumstances which would have to be considered thereafter. But none the less when the event happens—that is to say, the death of Lady Roundway and the proof of the joint will as part of her testamentary disposition—then in those circumstances there will be, in my judgment, a direction and appointment by those two named persons which will comply with the requirements of the testator as provided in this clause, and will therefore be an effective appointment, and I decide accordingly.

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—

Solicitors : *Capron & Co. ; Longbourne, Stevens & Powell, for Jackson & Jackson, Devizes.*

E. K. C.

EVE J.

In re JOHN DRY STEAM TUGS, LIMITED.

1932

[No. 0030 of 1932.]

Feb. 16.

*Company—Winding-up—Preference and Ordinary Shares—Surplus Assets
—Right of Preference Shareholders to participate in Distribution.*

A company was incorporated in 1909 with a capital of 25,000*l.*, divided equally into preference and ordinary shares of 10*l.* each, a small proportion of which only were fully paid. Under clause 5 of the articles of association the preference shareholders were entitled (1.) to a fixed cumulative dividend at the rate of 5 per cent. per annum on their paid up capital, and after payment of 5 per cent. on the ordinary shares to an additional one-half per cent. for each 1 per cent. in excess of 5 per cent. paid on the ordinary shares, and (2.) to priority in the event of a winding-up both as to the cumulative dividend and return of capital.

In 1929, the company went into voluntary liquidation, and after payment of all debts and return to the shareholders of the capital paid up on their shares there was a surplus available for distribution of 10,000*l.* :—

Held, on a summons taken out by the liquidator, that there being nothing in the articles to modify or exclude the normal right of the preference shareholders to share in the distribution of the surplus assets, they were entitled to rank *pari passu* with the ordinary shareholders in such distribution.

In re Espuela Land and Cattle Co. [1909] 2 Ch. 187 and *Anglo-French Music Co., Ltd. v. Nicoll* [1921] 1 Ch. 386 followed, in preference to *Collaroy Co. v. Giffard* [1928] Ch. 144.

SUMMONS by liquidator in winding-up.

The company, John Dry Steam Tugs, *Ld.*, was incorporated in 1909 with a nominal capital of 25,000*l.* divided into 1250 preference shares of 10*l.* each and 1250 ordinary shares of 10*l.* each, of which 916 preference shares, paid up to the extent of 7*l.* 10*s.* per share, and 1050 ordinary shares, 50 fully paid and 1000 paid up to the extent of 7*l.* 10*s.* per share, had been issued. The company carried on business until August 2, 1929, when a resolution for voluntary winding-up was passed and a liquidator was appointed. The liquidator, after paying or making provision for all debts, and collecting all the assets and repaying to the preference and ordinary shareholders all the capital paid up on their shares, had surplus assets available for distribution among the persons entitled of about 10,000*l.*

By clause 5 of the articles of association: "Subject as hereinafter provided, the rights following shall be attached to the preference shares: (1.) The holders of the said preference shares shall be entitled to a fixed cumulative dividend at the rate of 5 per cent. per annum on the capital for the time being paid up on the said preference shares respectively, and after paying or providing for the payment of a dividend for such year at the same rate on the capital for the time being paid up on the ordinary shares to an additional one-half per cent. calculated on the same basis for each one per cent. in excess of five per cent. paid or declared on the amount paid up for the time being on the ordinary shares. (2.) The holders of the said preference shares shall in a winding-up have priority both as to cumulative dividend aforesaid and return of capital over all other shares in the capital for the time being of the company. (3.) The rights hereby attached to the said preference shares shall not be modified otherwise than in accordance with the provisions contained in clauses 58 and 153 hereof."

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The summons asked whether, on the true construction of the memorandum and articles, the surplus assets of the company: (a) ought to be divided between the shareholders in proportion to the amount paid up on the shares respectively held by them, or in proportion to the number of shares respectively held by them, or in some other and what proportion; (b) ought to be distributed on the footing that the preference shareholders were entitled to participate with the ordinary shareholders in such distribution rateably, or in some other and what proportion, or upon the footing that the preference shareholders had no right to participate in such distribution. It was agreed on the first question that the surplus assets ought to be distributed among such of the shareholders as were entitled thereto in proportion to the amounts paid up on their shares.

D. Ll. Jenkins for the liquidator.

Gordon Brown for the preference shareholders. There is a conflict of authority upon this question. I submit

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that the latest decision, that of Astbury J. in *Collaroy Co. v. Giffard* (1), is incorrect, and that the preference shareholders are entitled to share *pari passu* with the ordinary shareholders in the distribution of the surplus assets. The tendency is to follow the decisions in *In re Espuela Land and Cattle Co.* (2) and *In re Fraser & Chalmers, Ltd.* (3)

H. S. G. Buckmaster for the ordinary shareholders. The present case is governed by the decision in *Collaroy Co. v. Giffard* (1), which I submit was correctly decided. Four out of the five special characteristics of that case are to be found here. The rights of the preference shareholders are completely defined in art. 5, and there is nothing in any of the other articles to give them any further rights. The right of priority in repayment of capital impliedly excludes the right to share in any surplus assets, which belong to the ordinary shareholders only. See also *In re National Telephone Co.* (4)

EVE J. The question raised is purely one of construction. The company is in voluntary liquidation, and the question is whether art. 5 is exhaustive of the rights attached to the preference shares or whether it is expressive only of certain rights they are to enjoy over and above their rights as contributories. If it is exhaustive, the preference shareholders have no interests in the surplus assets to which this application relates; if, on the other hand, it is merely expressive of their exceptional rights, then they will come in to share *pari passu* with the ordinary shareholders in the distribution of the surplus.

The two first paragraphs of the article relate to different stages in the company's history—the one regards it as a going concern, the other as in the course of liquidation. Accordingly the one provides for the share of profits to be assigned to the preference shareholders during the profit earning period of the company's existence, and the other determines how the capital is to be repaid when the winding-up supervenes. Nothing is said as to the distribution of any assets still remaining for distribution after the capital has

(1) [1928] Ch. 144.

(2) [1909] 2 Ch. 187.

(3) [1919] 2 Ch. 114.

(4) [1914] 1 Ch. 755, 769.

been repaid, but in the absence of any provision to the contrary these assets—the joint result produced by the employment of capital contributed by the two classes of shareholders—ought to be shared by all the contributories.

The same question with which I have to deal has been raised in several cases, and in many of them the provisions relating to the rights of the preference shares have been examined with meticulous care: *Collaroy Co. v. Giffard* (1); but, speaking generally, the question has resolved itself into one of construction—namely, whether the memorandum and articles contain an exhaustive delimitation of the rights of the preference shareholder. I do not think it would serve any good purpose were I to examine the cases with a view to extracting from them the various indicia which have been taken hold of as establishing the existence of that exhaustive delimitation. I shall, I think, do all that is necessary if I indicate the only features in this case which have been put forward in other cases as arguments against the claim of the preference shareholders to share in surplus assets.

The features I refer to are: (1.) the right of the preference shareholders to participate in profits over and above their fixed cumulative dividend; and (2.) the right of priority in the repayment of capital. But there is authority for saying that neither of these features is sufficient to exclude the preference shareholder from participating in the ultimate surplus assets: *Anglo-French Music Co., Ltd. v. Nicoll* (2); *In re Espuela Land and Cattle Co.* (3); and *In re Fraser & Chalmers, Ltd.* (4); and, in the absence of any indication in the contract between the ordinary and preference shareholders that the latter were abandoning any of their rights as contributories, I am bound to hold that in this case the surplus assets must be distributed amongst all the shareholders.

Solicitors: *Linklaters & Paines, for W. Mark Pybus & Sons, Newcastle-upon-Tyne.*

(1) [1928] Ch. 144.

(2) [1921] 1 Ch. 386.

(3) [1909] 2 Ch. 187.

(4) [1919] 2 Ch. 114.

C. A. *In re* JOHN SINCLAIR LIMITED'S TRADE MARK.

1931

MAUGHAM

J.

[1931. A. 1384.]

Nov. 5, 6. *Trade Mark—Assignment—Goodwill to accompany Assignment—Invalid Assignment—Motion to rectify Register—Registration of Assignment expunged—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 22—Trade Marks Rules, 1920, Sch. III.*

C. A.

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Jan. 26, 27.

The Trade Marks Act, 1905, s. 22, enacts: "A trade mark when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in the goods for which it has been registered":—

Held, by Maugham J. and the Court of Appeal, that, when a mark has been registered in respect of a class of goods, an assignment of the mark is invalid, unless there is assigned with it the goodwill of the business connected with the whole class, even though the mark has only been used in connection with one kind of goods in the class.

When an assignment of a registered trade mark is held to be invalid in a case where the original proprietor of the mark is not before the Court, it is the entry on the register in respect of the assignment only which should be expunged and not the whole entry of the mark.

So *held* by the Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.), varying the order of Maugham J. on this point.

ORIGINATING MOTION.

On June 6, 1923, Carreras, Ltd., registered Trade Mark No. 437,870 in Class 45, in respect of "Tobacco, whether manufactured or unmanufactured." About the end of 1929 or the beginning of 1930, Carreras, Ltd., acquired a holding in the capital of John Sinclair, Ltd., the respondents to this motion, which gave them control of that company's business, with the result that, for business purposes, the two companies became one concern. By a deed of assignment dated January 24, 1930, Carreras, Ltd., assigned to the respondent company the mark, "together with the goodwill of the business concerned in the goods with respect to which the mark is registered"; and on February 28, 1930, the respondent company were entered in the register as subsequent proprietors. The assignment took place because it was considered that it would be to the mutual advantage of Carreras, Ltd., and the respondent company if a business of the manufacture and sale of a particular brand of cigarettes until then carried on

by Carreras, Ltd., were to be carried on by the respondent company. The mark consisted of the words "The Tatler" in block capitals above the figure of a man in eighteenth-century costume. Since the date of the assignment the business of the manufacture and sale of cigarettes under the mark was continuously carried on by the respondent company, who, however, placed their orders for the manufacture of the cigarettes with Carreras, Ltd. The cigarettes were consigned to the respondent company, who alone marketed them, the respondent company being debited with the manufacturing costs. From the date of the assignment to March 31, 1931, the respondent company sold under the mark 69,001,410 cigarettes. For the year ending March, 1930, Carreras, Ltd., had sold 89,270.

Shortly before June, 1931, the Arcadian Tobacco Co., Ltd., the applicants on this motion, applied to register a trade mark including the word "Tatler," and objection was taken by the Registrar on the ground of the entry in the register of the mark No. 437,870. On June 4, 1931, the applicants issued this notice of motion for an order that the Register of Trade Marks might be rectified by expunging the entry of that mark, and on November 5, 1931, the motion came before the Court for hearing. It was contended for the applicant company that, inasmuch as Carreras, Ltd., were still carrying on business in cigarettes and tobacco, it was clear that their business concerned in the goods with respect to which the mark was registered was not transferred to the respondent company by the deed of assignment; that this deed did not, therefore, record the real transaction which the parties had carried out or intended to carry out; and that the transaction (if any) in fact carried out was not an assignment of the goodwill of the business in connection with which the mark had been registered. The evidence of a director of the respondent company, who was also a director of Carreras, Ltd., stated that Carreras, Ltd., had manufactured cigarettes for the respondent company under the mark since the date of the assignment, because the respondent company's factory was engaged to

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full capacity in the manufacture of other cigarettes and tobacco; the respondent company intended, however, it was stated, to manufacture cigarettes under the mark at their own factory as soon as the necessary reorganization of the factory could be carried out.

F. E. Bray for the applicant company.

W. Trevor Watson K.C. and *J. H. Evans-Jackson* for the respondent company.

MAUGHAM J. The motion before the Court is made on behalf of Arcadian Tobacco Co., Ltd., and seeks an order that the Register of Trade Marks may be rectified by expunging the entry of Trade Mark No. 437,870, registered in the name of John Sinclair, Ltd., or such other order as the Court may think fit.

The grounds of the application, stating them quite shortly, are that Carreras, Ltd., who were the owners of this mark from the date of its registration on June 6, 1923, thought fit on June 24, 1930, to assign the mark to the respondent company together with the goodwill of the business of Carreras, Ltd., concerned in the goods with respect to which the mark was registered. The applicant company assert that, having regard to the circumstance that a mark can be assigned only in connection with goodwill, and having regard in particular to the precise terms of s. 22 of the Trade Marks Act, 1905 (1), nothing passed by that assignment, so that the respondent company have no claim to the mark; and it is added that, as they have used it since the date of the assignment, the circumstances are such that the proper course for the Court to adopt is to direct the mark to be expunged from the register.

There is no dispute as to the facts. The mark includes the word "Tatler," and beneath the word the figure of a gentleman in Georgian costume. Until the assignment, the

(1) Sect. 22: "A trade mark when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in

the goods for which it has been registered and shall be determinable with that goodwill. . . ."

cigarettes to which it applied were sold by Carreras, Ltd., in fairly large quantities. For the year before March, 1930, it appears that about 90,000 were sold.

Carreras, Ltd., acquired the share capital in the respondent company, and obtained by that holding complete control of the respondent company's business; and it was thought that it would be to the mutual advantage of the two companies if the business in the manufacture and sale of the particular brand of cigarettes, which I shall call "Tatlers," sold under the trade mark in question, were to be carried on by the respondent company. Subsequently to that the respondent company has carried on the business in those sales, but has not manufactured any of the cigarettes, which had continued to be manufactured by Carreras, Ltd. The sales of cigarettes since the assignment and up to March 31, 1931, totalled some sixty-nine millions of the cigarettes in question, so that it appears that the sales of these cigarettes in the hands of the respondent company have been enormously greater than they were before.

I will not stop to read s. 22 of the Trade Marks Act, 1905, to which reference has been made. I would observe that there seems to me to be a question of construction on the first sentence in that section, which, on one view, will dispose, as I think, of any question on this motion. There is more difficulty, perhaps, in regard to the proper way of dealing with the motion if that question of construction is decided on the other alternative. I shall deal first with that, and shall therefore keep that question wholly apart from any question of what may be called the merits of the case, and apart from any question as to how far goodwill is severable and how far trade marks can be assigned in connection with the severed portion of the goodwill in respect of which they have been previously used.

The first sentence of s. 22 of the Trade Marks Act, 1905, is: [His Lordship read it, and continued:] The question arises: What is the meaning of the words, "the business concerned in the goods for which it has been registered"? This Act of Parliament, like any other, has to be construed

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having regard to all its sections. A meaning is not given in vacuo, so to speak, to a section ; still less is it justifiable to give, by considering merely a single section, what the Court might think would be a reasonable way in which to frame the section for the purpose of avoiding inconvenience. Sect. 8 provides : " A trade mark must be registered in respect of particular goods or classes of goods." There is a classification or list of classes contained in the Third Schedule to the Trade Mark Rules, 1920, made by the Board of Trade under s. 60 of the Act. Under those rules a great number of different classes of goods have been specified in respect of which trade marks may be registered. I think that I was told that there were fifty of them, the last class being a class for miscellaneous goods. The present mark was registered in respect of " Tobacco, whether manufactured or unmanufactured." That is the exact description of the goods mentioned in Class 45.

In my opinion, the phrase " goods for which it has been registered," in s. 22, can be construed only as referring back to s. 8, and to the classes of goods that may from time to time be specified under the rules as goods in respect of which a particular mark must be registered. Accordingly, as a matter of construction, I am of opinion that a mark registered in respect of tobacco, whether manufactured or unmanufactured, can be assigned and transmitted only in connection with the goodwill of the business of the assignor in respect of tobacco, whether manufactured or unmanufactured. It is worth while pointing out that that, of course, does not mean that the owner of a business consisting, for example, of the manufacture of cutlery and edged tools, and also of glass, and also of metal goods not included in other classes, might not assign and transmit in connection with the goodwill in, for example, cutlery and edged tools, the marks registered in respect of that particular business. In other words, I find that the only severance in the goodwill of the business of a manufacturer permitted by the terms of s. 22 is that effected by the division of the particular goods or classes of goods which has to be made under the Act. I am inclined to agree that this construction may lead to inconvenience. For

example, I think that a man might have a mark for musical instruments, and might make some of the musical instruments at Worcester and others at Exeter, and keep his businesses perfectly distinct. I cannot in that case see why he should not, as a matter of common sense, be entitled, having two separate goodwills, to assign the marks which he had registered in respect of musical instruments so far as they could be separated as between those two geographically separated businesses. But, in my opinion, the words of the section do not permit such a severance. They indicate that the goodwill concerned in the goods for which the mark has been registered is a single goodwill. I have thought it right to express my opinion on that question of construction, because I feel that this is the sort of case that may well go further, and that the matter is of great importance to trade mark holders generally.

Now I will pass on to consider what is the true view with regard to the present assignment, on the assumption that I am wrong in the view that I have expressed of s. 22. If s. 22 provided that "a trade mark when registered shall be assigned and transmitted only in connexion with the goodwill of the business of the proprietor of the said mark," there would, no doubt, arise the question of the meaning of "goodwill," the question whether and under what conditions goodwill—i.e., the goodwill of a particular manufacturer—is ever severable, and, I think, in the present case, the question whether there was any ground for thinking that there was any real separate goodwill in respect of which this assignment could properly be made. I am certainly not going to hold in this case that a manufacturer may not have, apart from this section, a number of different goodwills and even a number of separate goodwills in respect of a single line of goods, i.e., in the present case, tobacco, manufactured or unmanufactured. I am not going to hold that there cannot be a goodwill in respect of a single brand of cigarettes owned by a manufacturer who makes, it may be, fifty brands. It seems to me that, in order to determine what is a goodwill in respect of a particular branch of a business of that kind,

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it is necessary to define terms as far as possible. I am not aware that anybody has ever succeeded in defining the meaning of the word "goodwill" as used in the Trade Marks Acts, but I think that a great deal of light may be thrown upon the real meaning by the observations of Lord Macnaghten and Lord Lindley in *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.* (1) In the course of his judgment, Lord Macnaghten said (2): "Then comes the question, Can it be said that goodwill has a local situation within the meaning of the Act? I am disposed to agree with an observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation. What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such." I pause there to say that I do not think that the learned Lord meant that a manufacturer could not have a number of businesses when he says: "The goodwill of a business is one

(1) [1901] A. C. 217.

(2) [1901] A. C. 223, 224.

whole"; and the true interpretation of that last sentence may require consideration of what is meant by "a business." For the moment, however, I am not going to embark upon that. I shall read one other passage, from the judgment of Lord Lindley, where he says (1): "Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which it adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own."

I will add to that this question: what does a "trade mark" mean? So far as the Trade Marks Acts throw light upon what is meant by the phrase, "goodwill of the business concerned in the goods for which it has been registered," that is to be found in s. 3 of the Act, which provides: "... A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale:" It is important to notice the disjunctive "or." The mark may be used, therefore, for five different purposes (taking this separation of purposes as being quite correct and binding) or for more than one of those five different purposes—namely, manufacture, selection, certification, dealing with, or offering for sale.

There is no evidence that Carreras, Ltd., possessed any separate goodwill, in the ordinary sense, in connection with Tatler cigarettes other than that which they possessed in connection with their other brands of cigarettes. I am dealing with the question whether there was a separate

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goodwill at the moment of time before the assignment. It is not suggested that the cigarettes in question were made in a particular warehouse by separate people under separate advice and that, in some way or other, there was something different in the way in which the tobacco was bought and the cigarettes were ultimately made up and put on the market from the way in which other tobacco was bought and the numerous other brands of cigarettes owned by Carreras, Ltd., were made up and marketed.

I come now to another question. If, as might well be the case, Carreras, Ltd., or any other of the big vendors of tobacco in this country, had fifty different marks for cigarettes and marketed all the fifty kinds, and if the reputation of all of the fifty kinds was due to the skill of the buyer, the blender, and the manufacturer, and possibly also of the vendor, could Carreras, Ltd., or the manufacturer owning the fifty brands, assert that they had, at the moment of assignment, fifty goodwills, one in respect of each brand?

To my mind, it is quite impossible to answer that question in the affirmative in the case of cigarettes or other similar articles made as the result of the work, skill and discrimination of the same group or groups of people. In my opinion, the only assertion that can ordinarily be made as to an article such as I am here dealing with (unless, indeed, the true view, having regard to the mode of user, is that the mark indicated before the date of the assignment that the goods in question were manufactured by Carreras, Ltd.), is that the mark means that the cigarettes are, in popular language, vouched for by Carreras, Ltd., as the owners of the mark.

To my mind, either view is fatal to the claim of the respondents. If the mark is a true manufacturer's mark, the respondents are confronted with the difficulty that, although there has been a purported assignment of the mark, the business of manufacturing the cigarettes has not been assigned, and Carreras, Ltd., still manufacture them. If, again, the true meaning of the mark is that the cigarettes are vouched for by Carreras, Ltd., the owners of the mark, and the only thing that has really been assigned with the so-called goodwill

is the right to put the cigarettes on the market, it still seems to me equally clear that no true goodwill has been assigned with the mark, because the reputation of Carreras, *Ld.*, which, so to speak, was all that was vouched for by the mark, is no longer vouched for in the hands of the respondents.

The matter is not quite free from authority, and I desire to rely in particular upon the decision of my brother Clauson in *Lacteosote, Ld. v. Alberman*. (1) That was a case in which one Famel, who manufactured in France a pharmaceutical preparation known as "Sirop Famel," obtained registration as a trade mark of a label under which the preparation was sold in France and England. I do not think that anything turns upon the precise form of the label, or upon the fact that the directions for use were printed in French. In 1923 Famel appointed Lacteosote, *Ld.*, his sole agents for the sale of Sirop Famel in Great Britain, and it was agreed that he should not sell or supply Sirop Famel to any persons in Great Britain other than that company. That agreement was complied with. In 1924 Famel assigned the trade mark to Lacteosote, *Ld.*, together with the goodwill of the business concerned in the goods with respect to which the mark was registered. Then, under circumstances with which I need not deal, there was an application to rectify the register by expunging the mark of Lacteosote, *Ld.* Clauson J. held that anyone reading either label would think that the article was made by Famel in France; that the 1907 mark was adapted to distinguish Famel's goods without any reference to the importer (there was a 1926 mark, about which I need not read anything); that s. 22 embodied the principle that had existed apart from statute, that the purchaser of a mark became the owner of it only if he became the purchaser of the business concerned in the goods to which the mark had been affixed; that, according to the strict tenor of the words of the assignment, Lacteosote, *Ld.*, had become Famel's complete successors in his business of producing and vending Sirop Famel, but that that had not been the

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(1) [1927] 2 Ch. 117; 44 R. P. C. 211.

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intention of the parties to the assignment ; that if Lacteosote, Ld., had become, in law, the owners of Famel's whole business, they must be treated in law as having abandoned the French part of the business and as having brought it to an end, with the result that the mark had determined with it ; and that the Acts did not permit a mark distinctive of a business composed of manufacturing and vending departments to be assigned with the vending portion separated from the rest of the business. I think that those statements, in so far as I have read them from the headnote (1), are correct. In the course of the case Clauson J. observed that the case was to some extent complicated by the fact that the assignment, by the consent of everybody, did not carry out what was intended. After dealing with that difficulty, the learned judge proceeded to consider the matter on the footing that the assignment was an assignment of only the British portion of Famel's business, i.e., the business of importing the preparation into Great Britain and selling it there. Then he continued (2) : " Unless it can be said that s. 22 enabled a mark, which is used for goods in which Famel's business of manufacturing in France and vending in France and England is concerned, to be effectually assigned, not with that business but with one department only of that business, the mark has never become the assignees' mark and cannot be registered in their names. The first clause of s. 22 (the only statutory provision which it is necessary for me to consider) does not, in my judgment, enable a mark distinctive of goods emanating from Famel's business (composed of manufacturing and vending departments) to be assigned with a portion of the business—namely, that of vending in Great Britain, that portion being separated from the rest of the business." I pause there to say that I understand that to mean being artificially separated at the moment of the assignment, because I conceive that there might be an antecedent separation in fact. Clauson J. continued : " If it were not so, the result would be that a mark distinctive of goods produced and sold in the business carried on by Famel would become by the assignment

(1) 44 R. P. C. 211, 212.

(2) [1927] 2 Ch. 117, 129.

distinctive, not of goods produced and sold in that business by Famel or his successors, but of goods sold in a newly separated and, therefore, different business by persons who succeeded Famel as vendors in Great Britain of the goods, but not as producers of them. Such a position seems to me to be inconsistent with the principle that a trade mark is distinctive of goods with which a particular business (whether carried on by the original trader or his successors) is concerned. If the identity of the business is destroyed the mark is destroyed with it." I think that that passage tends strongly to support the conclusion at which I have arrived, although I agree that there were circumstances in the case before Clauson J. which are not present in the case before me.

On the whole I come to the conclusion that the purported assignment in the present case was invalid, so far as concerns the trade mark, because it was one not permitted by the Trade Marks Acts.

A question arises as to the form of relief. If the assignment had been very recent, and no fresh reputation or meaning could have been acquired in the market by the use of the mark, and only a small quantity of cigarettes had been sold since the alleged assignment, I think that the proper form of order might very well have been simply to expunge the notice of the assignment, the result of which would have been to leave Carreras, Ltd., on the register as the owners of the mark : but, having regard to the fact that the respondents have entirely altered the size of the trade in the cigarettes, which has gone up in their hands from ninety thousand to sixty-nine million during the short period, I think that I must conclude that it would be quite wrong to do anything more than follow the course which I have known to be followed in other cases of this kind, and that I should order the mark to be expunged. In support of that view, I may refer to *Bowden Wire, Ltd. v. Bowden Brake Co., Ltd.* (1) If, as a result of the void assignment, the respondents are to be treated as having used, with the consent of Carreras, Ltd., this mark, which was really the mark of Carreras, Ltd., to that extent the mark must be

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(1) (1914) 31 R. P. C. 385.

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bad. Further, it seems to me that, having regard to the facts which I have mentioned, the right of Carreras, Ltd., to the mark must be treated as having been wholly abandoned.

As a result of these considerations, I hold that the motion succeeds. There will be an order that the register be rectified by the removal of the trade mark in question.

K. R. A. H.

C. A. The defendants appealed. The appeal was heard on January 26 and 27, 1932.

Trevor Watson K.C. and *Evans-Jackson* for the appellants. The question here mainly turns on the meaning in s. 22 of the Trade Marks Act, 1905, of the words providing that a trade mark is only to be assigned "in connexion with the goodwill of the business concerned in the goods for which it has been registered." It is contended as a matter of construction that all that has to be assigned with the trade mark is such goodwill as necessarily appertains to the mark. Goodwill has not to be judged by reference to the goods for which the mark is registered, for goodwill has nothing to do with registration. Thus a mark may be registered without having been used, and no goodwill can exist until a business in connection with the mark has been built up. If marks are registered in more than one of the different classes specified in Sch. III. to the Trade Mark Rules, 1920, the owner can clearly assign a mark in respect of one class and retain the marks in respect of other classes. But beyond that it has to be remembered that goods in the same class are often of widely different characters. It is meaningless to talk of the goodwill of a class for which a mark can be registered under s. 8 of the Trade Marks Act, 1905. Sects. 24 to 27 of the Act deal with associated marks for the same goods or description of goods, and s. 27 provides that "Associated trade marks shall be assignable or transmissible only as a whole and not separately." If *Maugham J.*'s decision as to s. 22 is correct, this provision was unnecessary.

[LAWRENCE L.J. To sell a mark apart from the goodwill of the business seems to offend against the whole spirit of the Trade Marks Acts.]

What was here assigned with the mark was the goodwill of the business connected with the manufacture and sale of the cigarettes known in the market as "Tatler" cigarettes. *Leather Cloth Co. v. American Leather Cloth Co.* (1) decided that there may be a property in a trade mark, which, on the sale of the right to manufacture the goods it designates, may also be sold.

In the course of trade, developments have occurred, with the result that at the present time the goodwill might consist substantially of the trade mark and nothing else. The business may consist in selling an article under the trade mark. In such a case there could be no objection to an assignment of the mark with such goodwill only as necessarily passed with the mark; and that is substantially the position here. All the mark necessarily implied before Carreras, Ltd., parted with it, was that the goods sold under it were vouched and marketed by them. So since the assignment the goods are vouched and marketed by John Sinclair, Ltd.

[LAWRENCE L.J. That would be the effect of an assignment in gross of the mark.]

There is something more here. The reason a mark cannot be assigned in gross is that in giving another the right to use the mark it becomes deceptive. But if, besides assigning the mark, the assignor agrees not to use it himself and to pass on any orders in respect of goods sold under it to the assignee, then there is in effect an assignment of the business connected with the mark. That is the result here. The consideration of what is the appropriate goodwill cannot be decided by reference to the class for which the mark is registered. The Register is divided into wholly arbitrary classes.

[LAWRENCE L.J. If Carreras, Ltd., had registered their trade mark not in respect of the whole of Class 45, but in respect of cigarettes only, it may well be that they could

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(1) (1865) 11 H. L. C. 523.

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It is of value that this should be said, although it does not assist this particular appeal.

[ROMER L.J. I cannot understand why the trade mark should be expunged, even if the assignment be held invalid.]

It is submitted that this wide order ought not to have been made, especially as Carreras, *Ld.*, are now before the Court. If the Court decides against the appellants on the question of the assignment, the assignment should be expunged and nothing more. In making the wide order Maugham J. relied on *Bowden Wire, Ld. v. Bowden Brake Co., Ld.* (1), but there the parties interested were all before the Court. The object of s. 22 is to prevent confusion or deception: *Lacteosote, Ld. v. Alberman* (2) and *In re Magnolia Metal Co.'s Trade Marks*. (3) Here there is nothing to suggest that the articles to which the mark is applied continue to have any connection with Carreras, *Ld.*, and the assignment ought therefore to be held valid.

F. E. Bray for the respondents. There is no ground for departing from the obvious meaning of the words used in s. 22, which require the assignment of a mark to be accompanied by "the goodwill of the business concerned in the goods for which it has been registered." Here the registration was in respect of "tobacco, whether manufactured or unmanufactured." The goodwill to be assigned must be commensurate with that class. Here, though the written words of the assignment comply with s. 22, in fact it was never intended to assign more than the trade mark and its use in regard to "Tatler" cigarettes, and Carreras, *Ld.*, have continued to carry on their tobacco business in all lines except those cigarettes. The appellants are inviting the Court to construe s. 22 so as to make valid any assignment which would at common law have been valid. The common law right depended on the circumstances, but the Trade Marks

(1) 31 R. P. C. 385.

(2) [1927] 2 Ch. 117.

(3) [1897] 2 Ch. 371, 396.

Act creates a statutory monopoly of a limited character, and no attempt has been made to identify the right of assignment with the common law rules as to assignment of common law rights. There is, therefore, no ground for straining the words of the section. It is incorrect to say that, on the view of s. 22 adopted by Maugham J., s. 27 is mere surplusage. Sect. 27 is so framed as to prevent the assignment of associated marks separately. It prevents registration. Sect. 22 only states the requisites of a valid assignment, but, as this case shows, registration of an invalid assignment may still take place under it.

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Again, when I have satisfied the Court that the mark is wrongly registered in the name of John Sinclair, Ld., the whole entry should be expunged as being wrong. It may be that Carreras, Ld., could afterwards apply to have the mark re-registered in their name. It is true that Carreras, Ld., is not before the Court, but it was not for us as a "person aggrieved" within s. 35 to do more than bring the registered proprietor of the mark before the Court. By executing this assignment Carreras, Ld., have estopped themselves from claiming any right to the mark.

[LAWRENCE L.J. That is a matter which could only be decided in their presence.]

All the Court can say is that the entry of the mark is wrong and expunge the whole. If Carreras, Ld., have a good case for retaining the mark they can always apply to have the original entry in their name restored. Carreras, Ld., have dealt with the mark so that it has ceased to be theirs, and therefore it should come off the register: *Bowden Wire, Ld. v. Bowden Brake Co., Ld.* (1)

[LAWRENCE L.J. All that Carreras, Ld., have done is to execute an assignment which they bona fide believed operated to transfer the mark.]

Even so, what they have done amounts to an abandonment of the mark. Further, Carreras, Ld., are not unaware of these proceedings; the main affidavit in support of the appellants' case was made by a man who was director both of

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the appellants and of Carreras, Ltd. In all the circumstances the proper course is to expunge the mark.

Trevor Watson K.C. replied.

LORD HANWORTH M.R. This is an appeal from an order made by Maugham J., that order being: "It is ordered that the Register of Trade Marks kept under the above mentioned Acts be rectified by the removal of the Trade Mark No. 437,870 registered in the name of John Sinclair, Limited, in Class 45, tobacco, whether manufactured or unmanufactured." Then the order provides that notice is to be given to the Registrar.

I think it important to state the facts succinctly, particularly because in these difficult cases which arise under the Trade Marks Acts it is impossible to give wide decisions for the purpose of expounding in all cases the meaning of the sections in question; the elucidation of the statutory provisions in relation to trade marks must be made step by step.

In the present case Carreras, Ltd., the well known tobacco manufacturers, on June 6, 1923, registered a trade mark which is of an eighteenth-century figure, with the words "The Tatler" written above. It was registered in respect of tobacco, whether manufactured or unmanufactured. That mark was, on January 24, 1930, assigned to Messrs. John Sinclair, Ltd., by an assignment the operative part of which was that in consideration of a nominal sum Carreras, Ltd., assigned to John Sinclair, Ltd., "all the trade mark now standing upon the Register of Trade Marks kept at the Patent Office, Southampton Buildings, London, W.C. 2, and therein numbered 437,870 in Class 45, together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered." Those are words copied out of s. 22.

The applicants, the Arcadian Tobacco Company, Ltd., claim that they are entitled to bring the matter to the attention of the Court, and to ask for the rectification of the Register under the terms of s. 35 of the Trade Marks Act.

That provides, by sub-s. 1: "The Court may, on the application in the prescribed manner of any person aggrieved . . . by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register . . . make such order for making, expunging, or varying such entry, as it may think fit." That motion came before Maugham J., and, as I have said, he ordered the complete removal of the trade mark.

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I must now go back a little way to refer to the relation between these two companies, Carreras, Ltd., and John Sinclair, Ltd. Carreras, Ltd., as I have said, are the well-known tobacco manufacturers, and they registered their mark in respect of tobacco, whether manufactured or unmanufactured. That was because, under s. 8 of the Act, "a trade mark has to be registered in respect of particular goods or classes of goods." The classes of goods are set out in the Third Schedule to the Trade Mark Rules, 1920, which separates goods up into fifty categories. Carreras, Ltd., had used this trade mark in relation to cigarettes, but their sale of the cigarettes, while they were using it, was comparatively small. We are told that it was something like 89,000 in the year prior to the time when the assignment took place. Since the assignment, Messrs. John Sinclair, Ltd., have pushed the sale of their cigarettes under this trade mark very successfully, with the result that Messrs. John Sinclair, Ltd., have sold something like sixty-nine million of these cigarettes in little more than the same length of time as that in which Carreras, Ltd., sold 89,000. That success was so great that apparently Messrs. John Sinclair were inconvenienced by the very size of it. They were unable conveniently to themselves, and economically, to manufacture the cigarettes to meet this very large demand, and they made an arrangement whereby it would appear that Carreras, Ltd., were employed by John Sinclair, Ltd., to make these cigarettes, and in due course were paid for them by John Sinclair, Ltd. All the cigarettes were handed over to John Sinclair, Ltd., by Carreras, Ltd., and the sale of them took place as a part of the goods of John Sinclair, Ltd., and on the little cartons in which the

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cigarettes were sold we find the name, "John Sinclair, Limited, London, Edinburgh, and Newcastle-on-Tyne." Anyone, therefore, who wanted these cigarettes would obviously apply to John Sinclair, Ltd., and not to Carreras, Ltd.

The applicants contend that this assignment ought not to remain upon the Register. It is certainly treated by both parties to the assignment as not truly stating its terms, and the words: "Together with the goodwill of the business concerned in the goods with respect to which the said trade mark is registered" are far too wide to denote what actually took place between John Sinclair, Ltd., and Carreras, Ltd. Carreras, Ltd., did not intend to assign the business of selling and dealing in manufactured and unmanufactured tobacco to John Sinclair, Ltd. They were really dealing with this trade mark within narrow limits.

I turn to s. 22 in order to appreciate the objection which is made by the Arcadian Tobacco Company, Ltd., to this transfer. By s. 22 it is provided: "A trade mark when registered shall be assigned and transmitted only in connexion with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that goodwill." That passage from s. 22 must be expanded in the light of the definition clause and s. 8. Sect. 3 provides: "A 'trade mark' shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale." Under s. 8 the trade mark must be registered in respect of particular goods.

As I have said, there are in Sch. III. to the Trade Mark Rules fifty categories of goods in respect of which a trade mark can be registered. It must, however, be remembered that a trade mark can be registered not only in respect of the whole of the goods in any particular class, but also in respect of a particular sort of goods embraced in a particular class.

The present trade mark of "The Tatler" was registered in respect of the whole of Class 45, which is "tobacco, whether

manufactured or unmanufactured." No limitation, therefore, is introduced which confines the use of the mark to, let us say, cigars or cigarettes, or tobacco sold for pipe smoking, or for use in any other way. Therefore, the registration of this mark is in respect of a large class of goods; and it is to be remembered that, if it is a good mark, it has to be used upon or in connection with the goods in respect of which it is registered "for the purpose of indicating that they are the goods of the proprietor."

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Sect. 22 appears to impose some limitation on the right of assignment or transmission of trade marks. Mr. Bray, I think, has rightly said that we must have regard to the actual words of the section without reference to any *a priori* views which might have been relevant to common law marks. The Trade Marks Acts are a code which gives validity to certain marks, marks which have not necessarily the attributes of common law marks, and the code covers marks which are proposed to be used but have not yet been used. Sect. 22 has now to be considered; but I take note of the fact that the difficulty which appeared to be created by the terms of s. 27 does not really exist, because it is admitted by counsel on both sides that it must be treated as dealing only with associated trade marks, the particular matters which are the subject-matter of ss. 24 to 27. It cannot therefore be used by way of contrast with s. 22 as altering the meaning of that section.

If we take s. 22 *simpliciter*, it seems to be plain enough. I desire, as I have said, to confine what I have to say to what is relevant to the facts in the case before the Court. *Ex concessis*, the assignment, which purports to comply with that section by using its words, is ineffective for that purpose. It would be a shock to both parties if the words were to be carried out in their full meaning. Carreras, *Ld.*, had no intention of handing over the goodwill of their business. Yet the trade mark is to be assigned in connection with the goodwill of the business of selling tobacco, manufactured or unmanufactured. It is in respect of those goods that the mark has been registered, and, therefore, the mark must be transferred with the goodwill

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of that business. The words used in the deed of assignment are plainly too large for what was intended to be effected by the transaction.

Therefore, we have a case in which an entry, having been made in the Register without sufficient cause, wrongly remains upon the Register. It seems, therefore, that the Arcadian Tobacco Company, *Ld.*, were justified in making their application for the rectification of the Register, but only to the extent of being entitled to an order expunging the entry of the assignment. Maugham J.'s order goes, as I have pointed out, much further. In his judgment he says : " A question arises as to the form of relief. If the assignment had been very recent, and no fresh reputation or meaning could have been acquired in the market by the use of the mark, and only a small quantity of cigarettes had been sold since the alleged assignment, I think that the proper form of order might very well have been simply to expunge the notice of the assignment, the result of which would have been to leave Carreras, *Ld.*, on the Register as the owners of the mark." I pause there. Carreras, *Ld.*, were not before the Court ; they have not been summoned to attend. I do not think that the Arcadian Tobacco Company, *Ld.*, in making the application in this case were bound to serve their application upon Carreras, *Ld.* ; but it certainly seems that for an order to be made expunging the mark, which, if the assignment is disallowed, would seem to remain the property of Carreras, *Ld.*, it would be necessary to have Carreras, *Ld.*, before the Court. It is suggested that in effect they were before the Court, because an affidavit was put in by Mr. Harry William Danbury, a director of both John Sinclair, *Ld.*, and Carreras, *Ld.*, in which he says that he is authorized by the two companies to make the affidavit ; but he stands merely as a witness for a party to the litigation. I think, therefore, that it cannot be said that that affidavit is sufficient to bring Carreras, *Ld.*, before the Court. As they are not before the Court, and might have something to say before their property, the trade mark, was expunged from the Register, it seems that Maugham J. would have

been right in limiting the order to one “simply to expunge the notice of the assignment.” He goes on in the following paragraph to give the reasons why he proceeded further, and came to the conclusion that he ought to order the mark to be expunged. In doing this he purports to follow the analogy of *Bowden Wire, Ld. v. Bowden Brake Co., Ld.* (1) but in that case *Bowden Wire, Ld.*, who registered the mark in question, were before the Court; and it does not appear to be an authority justifying the actual order which has been made. The learned judge says: “If, as a result of the void assignment the respondents are to be treated as having used, with the consent of *Carreras, Ld.*, this mark, which was really the mark of *Carreras, Ld.*, to that extent the mark must be bad.” Before coming to that conclusion I should like to have had *Carreras, Ld.*, before the Court to deal with the question whether, if the assignment is void, the respondents are to be treated as having used this mark with the consent of *Carreras, Ld.* What has been done, apparently, is, that by an ordinary commercial arrangement between one tobacco manufacturing company and another, there has been a manufacture and sale of a very large quantity of cigarettes by the one company to the other; but what particular characteristics are to be attached to that are matters which ought to be ascertained from the true facts discovered when both parties are before the Court.

Under those circumstances, it appears to us that the order of *Maugham J.* must be amended and confined to the expunging of the assignment. The effect is that the appeal fails on the broad point which was contended for, and the order of *Maugham J.* will be varied in the way which I have indicated.

LAWRENCE L.J. I agree. The sole question in this case is whether *Carreras, Ld.*, the original proprietors of the Trade Mark No. 437,870, could assign that mark with such goodwill as necessarily attached to it by reason of its user in their hands as such proprietors, but without assigning the goodwill of their business of manufacturing tobacco or cigarettes or any

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part of such business. The answer to that question depends upon the effect of the expression in s. 22 of the Act of 1905 : "The goodwill of the business concerned in the goods for which it"—that is, the trade mark—"has been registered."

First, in order to determine the effect of that expression, it has to be ascertained in respect of what goods the trade mark was registered at the date of the assignment. In the present case the trade mark was registered for tobacco, whether manufactured or unmanufactured, being the whole of the goods in Class 45 of the Trade Marks Classification. Next we have to find out what was the business concerned in those goods which was carried on by the assignors. There, again, there is no difficulty ; the business carried on by them was that of manufacturers of, and dealers in, tobacco, manufactured and unmanufactured. It follows therefore that the goodwill of the business of manufacturing and dealing in tobacco, whether manufactured or unmanufactured, was the business concerned in the goods in respect of which the trade mark was registered within the meaning of the section. I agree with Maugham J. that there is no indication in the section that a trade mark can be assigned with only a portion of the goodwill of the business concerned in the goods for which it is registered. Without expressing any concluded opinion whether a goodwill can be split up, I am clearly of opinion that a trade mark cannot be assigned with only that portion of the goodwill which necessarily passes with the trade mark when it is assigned by itself. That would be to affirm the proposition that a trade mark can be assigned in gross, as such an assignment would necessarily carry with it such goodwill as attaches to the mere user of the trade mark.

In the present case the deed of assignment purports to assign the goodwill of the business concerned in the goods for which the trade mark has been registered in the words of the section, and if my view of the effect of these words be right, the assignment would, on the face of it, pass the goodwill of the whole business of Carreras, Ltd. However, John Sinclair, Ltd., do not suggest that this was the intention of the parties

to the assignment, and admit that no goodwill was intended to pass, except such as would necessarily attach to the trade mark on its assignment.

For the reasons I have expressed I agree that this appeal fails.

As regards the variation of the order, I agree with what my Lord has said, and do not desire to add anything.

ROMER L.J. I agree. As between themselves and the applicants, Messrs. John Sinclair, Ltd., are willing that this case shall be decided on the footing that all that passed to them under the assignment in respect of goodwill was a goodwill, if there can be such a thing, in the sale of cigarettes, or it may be tobacco generally, under the name of "Tatler."

That being so, it appears to me that the assignment of the trade mark is invalid, in view of s. 22 of the Act. That the section may lead to inconveniences, and, indeed, in some cases, hardship, I can see; but that is no reason why the Court should fail to give effect to the language of the section, language which, in my opinion, is perfectly plain and unambiguous.

For these reasons I agree that the appeal, so far as it is directed against the order of Maugham J. for the removal of the notice of assignment from the register, fails.

As regards the question as to the variation of the order, I have nothing to add to what has been already said.

Order varied.

Solicitors for the appellants: *Wingfields, Halse & Trustram.*

Solicitor for the respondents: *Hon. F. F. Macnaghten.*

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[1931. D. 526.]

Will—Bequest of Chattels—“To be used and enjoyed by the person or persons” who under a settlement were “in the actual possession or entitled to the receipt of the rents and profits” of Settled Land—Disentail by Tenant in tail in remainder—Conveyance of Fee Simple to Another—Person who would but for the Disentailing Deed have become Tenant in tail in possession.

By his will dated May 22, 1879, a testator bequeathed certain chattels to his executors upon trust to “permit the same to go along with and be used and enjoyed so far as the rules of law and equity will permit by person or persons who under or by virtue of this my will shall for the time being be in the actual possession or entitled to the receipt of the rents and profits of the mansion and demesne of Waresley included in and settled by” a Resettlement dated October 31, 1874, but so as not to vest absolutely in any tenant in tail by purchase until he attained twenty-one years of age. The will also contained a bequest of residuary personal estate. The Waresley estate was not settled by the testator’s will but by the Resettlement, and the words “this my will” in the bequest of chattels were therefore construed as “the Resettlement.”

In the events which had happened the testator’s daughter, Emily, was on July 6, 1917, tenant for life in possession under the Resettlement, and his nephew Alfred tenant in tail in remainder expectant on the event which happened of the testator’s three daughters dying without sons. By a disentailing deed of that date Alfred disentailed the property comprised in the Resettlement with the consent of Emily as protector of the settlement, and Alfred and another daughter of the testator joined in conveying the property to Emily in fee simple.

Emily survived the testator’s other daughters and died in 1930. In the events which had then happened the testator’s great nephew Basil would, but for the disentailing deed, have then become tenant in tail in possession. He died soon afterwards.

On a summons raising the question who on the death of Emily became entitled to the chattels, Luxmoore J., who would apart from authority have held that the chattels fell into residue, decided on the authority of *Hogg v. Jones* (1863) 32 Beav. 45 that Basil became entitled to the chattels absolutely on Emily’s death. On appeal:—

Held (reversing the decision of Luxmoore J. but without deciding whether the chattels belonged to Emily absolutely or fell into residue), that as Basil had never been in the physical possession of the mansion house and demesne of Waresley, he did not become entitled to the chattels on Emily’s death.

Hogg v. Jones (32 Beav. 45) overruled.

APPEAL from Luxmoore J.

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By his will dated May 22, 1879, the Hon. Octavius Duncombe (who died on December 3, 1879), after purporting to confirm the Resettlement of real estate executed by himself and his eldest or only son, Captain Walter Henry Octavius Duncombe, on October 31, 1874, and giving certain legacies, bequeathed all his household goods and furniture, plate, linen, china, glass, books, drawings, pictures and prints in and about or usually appropriated or belonging to his mansion houses at Waresley and Westerdale respectively to his executors upon trust to "permit the same to go along with and be used and enjoyed so far as the rules of law and equity will permit by the person or persons who under or by virtue of this my will shall for the time being be in the actual possession or entitled to the receipt of the rents and profits of the mansion and demesne of Waresley aforesaid included in and settled by the said Indenture of Resettlement of the 31st day of October 1874 yet so that the same shall not vest absolutely in any tenant in tail by purchase of the said mansion and premises unless such person shall attain the age of 21 years but on the decease of any such person being tenant in tail by purchase shall go and devolve and remain in the same manner as if they had been freeholds of inheritance and had been included with the said mansion and premises."

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Then, after giving further pecuniary legacies, the testator bequeathed all other his personal estate and effects (other than chattels real), not otherwise specifically bequeathed, to W. H. O. Duncombe.

It was not seriously contended that the words in the bequest of chattels "under and by virtue of this my will," ought not to be construed as "under and by virtue of the said Indenture of Resettlement of the 31st day of October, 1874," in view of the fact that the mansion and demesne of Waresley were not settled by the will but by the Resettlement.

By the Resettlement lands in the counties of York and Huntingdon, including the mansion houses at Waresley and Westerdale, were settled and appointed to the use of the

C. A. testator for life, and after his death to the use of W. H. O.
 1932 Duncombe for life, and after his death to the use of his first
 DUNCOMBE, and other sons successively in tail male, with remainder to
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 WRIXON- Charles Duncombe, and his sons in tail male, with remainder
 BECHER to the like uses in favour of the testator's daughters, Emily
 v. Charlotte Duncombe, Blanche Elizabeth Caroline Duncombe
 FAVERSHAM. and Lady Maude Augusta Louise Calthorpe respectively for
 life with remainder to their sons respectively in tail male,
 with remainder to the use of the testator's brother, the Very
 Reverend Augustus Duncombe, for life and his sons successively
 in tail male, with remainder to the use of the testator's brother,
 Admiral Arthur Duncombe, and his sons successively in tail
 male, with divers remainders over.

The Very Reverend Augustus Duncombe died on January 26, 1880, leaving three sons, of whom the eldest was Alfred Charles Duncombe, Henry Charles Duncombe died on August 25, 1903, and W. H. O. Duncombe died on January 6, 1917. At the date of the disentailing deed next to be mentioned, Emily Charlotte Duncombe and Blanche Elizabeth Caroline Duncombe were living and unmarried; Lady Calthorpe was also living and had had one son only, who had died on December 21, 1906, without having executed any disentailing deed. It followed that in the events which had happened, Emily Charlotte Duncombe was tenant for life in possession, and Alfred Charles Duncombe was tenant in tail in remainder expectant on the death of the testator's three daughters without sons.

By a disentailing deed dated July 6, 1917, property comprised in the Resettlement, including the mansion and demesne of Waresley, was disentailed by Alfred Charles Duncombe, with the consent of Emily Charlotte Duncombe as protector of the settlement, and he and Lady Calthorpe joined in conveying the property so as to vest it in Emily Charlotte Duncombe in fee simple.

Blanche Elizabeth Caroline Duncombe died on October 17, 1917, a spinster, and Lady Calthorpe died on March 9, 1925, leaving four daughters but no son. Alfred Charles Duncombe

died on February 22, 1925, and the other two sons of the Very Reverend Augustus Duncombe both died in the lifetime of Emily Charlotte Duncombe without issue. Emily Charlotte Duncombe died on May 4, 1930, a spinster, having by her will, dated November 3, 1928, bequeathed all her plate, plated goods, linen, china, glass, books, pictures, prints, statues, sculptures, musical instruments, and articles of vertu to the defendant the Earl of Faversham.

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But for the operation of the disentailing deed upon the death of Emily Charlotte Duncombe and in the events which had happened, Basil Archibald Charles Duncombe, a grandson of Admiral Arthur Duncombe, would have become entitled as the first tenant in tail in possession. He died on September 22, 1930, and the defendants, Wilfred Arthur Duncombe Anderson, Norman Charles Barraclough and Noel Edgar Barraclough, were his executors.

This summons was taken out by the personal representatives of Emily Charlotte Duncombe to have it determined (*inter alia*) whether upon the true construction of the testator's will, and in the events which had happened the chattels settled by the testator : (a) became vested in Emily Charlotte Duncombe absolutely, or (b) became vested on the death of Emily Charlotte Duncombe in Basil Archibald Charles Duncombe, or (c) passed on the death of Emily Charlotte Duncombe to the persons entitled under the trusts declared concerning the testator's residuary personal estate. The defendant Walter John Hervey was made a party to these proceedings to represent the testator's residuary personal estate.

Luxmoore J. said that in his view the material clause in the testator's will must be construed as a gift of the chattels to the person or persons who under the limitations of the Resettlement should for the time being be in the actual possession or entitled to the receipt of the rents and profits of Waresley. The difficulty was caused by the word "actual." If that made it necessary that the possession was to be physical possession under the limitations of the Resettlement, no one ever satisfied the provision after the death of Emily

C. A. Charlotte Duncombe, for she took the fee simple by a conveyance outside the Resettlement, and no one ever became entitled under the limitations of the Resettlement as tenant in tail in possession. Apart from authority he would have been prepared to accept this as the true construction, and consequently to have held that the chattels fell into the testator's residuary estate. He felt, however, compelled to follow the decision of Lord Romilly in *Hogg v. Jones* (1), a case which had been decided in 1863 and had been discussed on more than one occasion, being relied on by Joyce J. in *In re Petre's Settlement Trusts* (2), and referred to without adverse comment in *In re Parker*. (3) He (his Lordship) must, therefore, hold that the persons entitled to the chattels were the personal representatives of Basil Archibald Charles Duncombe, the person who would on the death of Emily Charlotte Duncombe have been the tenant in tail in physical possession, if the 1917 disentailing deed had never been executed.

Lord Faversham and Walter John Hervey appealed.

Fergus Morton K.C. and *Lindsay M. Jopling* for the appellants. We represent two of the claimants to the chattels, and therefore the only question for the Court is whether Luxmoore J. was right in holding that Basil A. C. Duncombe became entitled to the chattels on Emily Charlotte Duncombe's death. The person beneficially entitled will be the same whichever of the two appellants we represent is entitled to the chattels. Our first contention is that on the assumption that the words "under or by virtue of this my will" in the bequest must be construed as meaning "under or by virtue of the Resettlement," there was no one who ever came into the actual possession of the settled lands under the Resettlement, and therefore that the bequest failed and the chattels fell into residue. That is the view Luxmoore J. would have taken but for *Hogg v. Jones*. (1) There are two lines of authorities on the subject. The first is when in such a bequest of heirlooms to accompany realty the word "actual"

(1) 32 Beav. 45.

(2) [1910] 1 Ch. 290.

(3) [1910] 1 Ch. 581.

is not used. In those cases the first tenant in tail who took a vested interest took the chattels, notwithstanding that he was only tenant in tail in remainder: *Foley v. Burnell*. (1) The other line of cases is where "actual possession" is required under the bequest. These words have always been treated as involving the necessity of physical possession of the land, except in *Hogg v. Jones* (2): *In re Fothergill's Estate* (3), where the same words were used as here.

[ROMER L.J. The words here are "in actual possession or entitled to the receipt of the rents and profits"; there is nothing in the second alternative to prevent a tenant in tail in remainder from taking.]

The two alternatives must be intended to refer to the same person, and the second limb must therefore be construed as meaning "entitled to the actual receipt of the rents and profits." Other cases besides *In re Fothergill's Estate* (3) belonging to this line of cases are *Lord Scarsdale v. Curzon* (4) and *In re Angerstein*. (5) *In re Fothergill's Estate* (3) makes the force of the word "actual" very clear, because besides the gift of chattels, in which that word occurred, there was a bequest of residue to the person "under or by virtue of the will entitled to possession or receipt of the rents," and the principle of *Foley v. Burnell* (1) was held to apply to that bequest. There was the same contrast in *Lord Scarsdale v. Curzon*. (4) There is no case, except *Hogg v. Jones* (2), where a reference to "actual possession" has not been held to exclude the view that the person to take is the person entitled to a vested interest under the settlement without any need to be in possession. It is contended that *Hogg v. Jones* (2) is distinguishable from the present case: (1.) because the word of the bequest is different; (2.) because here the expression used is "under or by virtue of," and not "under the limitations of," the latter words being far more appropriate to show that regard is to be had only to a paper title; and (3.) because the bequest here is of chattels closely linked up

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(1) (1783) 1 Bro. C. C. 274; (1785)
4 Bro. P. C. 319.
(2) 32 Beav. 45.

(3) [1903] 1 Ch. 149.
(4) (1860) 1 J. & H. 40.
(5) [1895] 2 Ch. 883.

C. A. with the use of the mansion house, which shows that physical possession of the mansion house is what is desired.

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But if this case be held indistinguishable, then it is contended that it was wrongly decided and ought to be overruled. Joyce J., in *In re Petre's Settlement Trusts* (1), purported to rely on *Hogg v. Jones* (2), but there the phrase "entitled to the actual possession" was under consideration and not "in the actual possession," as in *Hogg v. Jones* (2) and here. In *In re Parker* (3) the expression to be construed was person "who shall succeed to my said mansion house," and that was treated as falling into the *Foley v. Burnell* (4) class. In that case Parker J. referred, without commenting upon it, to *Hogg v. Jones*. (2) In *In re Lord Chesham's Settlement* (5) the words used were construed as involving physical possession. The only difficulty here is created by *Hogg v. Jones*. (2) It has never been overruled, but it has not before come up for consideration in the Court of Appeal. It should now be overruled, and the Court should hold that one or other of the appellants is entitled to the chattels.

C. Harman for the personal representatives of Basil A. C. Duncombe. The Court ought to lean against holding that the chattels fell into residue, as the plain intention of the testator was that the chattels and mansion house at Waresley should go together. Until 1926 no man could disentail chattels, and yet it is said that the testator's intention has been defeated by the disentailing deed and subsequent conveyance of the fee simple. Basil A. C. Duncombe became entitled on Emily Charlotte Duncombe's death, because he then became, when the limitations of the Resettlement are taken into account, and nothing else, tenant in tail in possession. "In actual possession" does not mean "in physical possession," but possessed of an estate in possession. *Lord Scarsdale v. Curzon* (6); *In re Fothergill's Estate* (7) and *In re Angerstein* (8) are, it is contended, all decided on this ground. Under the words of the bequest regard must be had solely to the position

(1) [1910] 1 Ch. 290.

(2) 32 Beav. 45.

(3) [1910] 1 Ch. 581.

(4) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

(5) [1909] 2 Ch. 329.

(6) 1 J. & H. 40.

(7) [1903] 1 Ch. 149.

(8) [1895] 2 Ch. 883.

under the Resettlement as if no disentailing deed had been executed: *Hogg v. Jones* (1) and compare *In re Trevanion*. (2) *Hogg v. Jones* (1) has been referred to without disapproval in Jarman on Wills, 7th ed., pp. 677, 678; in *In re Cresswell* (3), where the part of the decision in *Hogg v. Jones* (1), now being relied upon, was not questioned; in *In re Fowler* (4), where *Hogg v. Jones* (1) was distinguished; and in *In re Cornwallis* (5), where that case was applied. A passage in Vaizey on Settlements, pp. 1349–1350, suggesting the addition of the word “actual,” shows that it was only intended to prevent a tenant in tail in remainder taking chattels settled along with realty: see also Davidson’s Precedents and Forms in Conveyancing, 3rd ed., vol. iii., Part I., p. 625, where again *Hogg v. Jones* (1) is mentioned without disapproval.

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[LAWRENCE L.J. The fact remains that Basil Duncombe never was even entitled in possession.]

He was when regard is only had to the limitations of the Resettlement. This case is really indistinguishable from *Hogg v. Jones* (1), a decision which has stood since 1863, and in these circumstances the Court ought not to depart from a decision of such standing. That decision is assisted by the decision in *In re Petre’s Settlement Trusts*. (6)

[No reply was called for.]

LORD HANWORTH M.R. This appeal must be allowed. The case is one in which Luxmoore J. had to determine what was the devolution of certain personal property, the household goods and furniture, plate, linen, china, glass, books, drawings, pictures and prints usually appropriated or belonging to mansion houses at Waresley and Westerdale respectively, as the same was bequeathed by the will of Octavius Duncombe. Luxmoore J. felt compelled to follow *Hogg v. Jones*. (1) If he had not done so, he would have held in favour, as I understand, of the residuary legatee, Walter Henry Octavius Duncombe, or, rather, his representatives, for he died on

(1) 32 Beav. 45.

(2) [1910] 2 Ch. 538, 544.

(3) (1883) 24 Ch. D. 102, 109.

(4) [1917] 2 Ch. 307, 324.

(5) (1886) 32 Ch. D. 388, 394.

(6) [1910] 1 Ch. 290, 296.

C. A. January 6, 1917. We have to reconsider the position, and
 1932 we are not bound by the decision in *Hogg v. Jones*. (1) [His
 DUNCOMBE, Lordship then stated the facts.] Mr. Morton is briefed to
In re. represent two of the claimants who represent the interests
 WR XON- of Emily Charlotte Duncombe and of Walter Henry
 BECHER Octavius Duncombe, the residuary legatee under the testator's
 v. will. Both of those claims are opposed to the claim of the
 FAVERSHAM, representatives of Basil Archibald Charles Duncombe, to whom
 Lord Hanworth I will hereafter refer as Basil, in whose favour Luxmoore J.
 M.R. decided. We have, therefore, to determine whether
 Luxmoore J. was right in that decision, or whether the
 decision ought to be in favour of Walter Henry Octavius or
 Emily Charlotte and their representatives, or one or other of
 them.

Parker J. said in *In re Parker* (2): "It is, in my opinion, clear, both on principle and on authority, that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for a vested estate of inheritance, whether in possession or remainder, becomes absolutely entitled to the chattels, subject, of course, to his interest being defeated by any event which would defeat his estate in the realty," and Luxmoore J. propounds the same principle. But here it is not simply a question whether or not any of these persons became entitled to a vested estate of inheritance. We have to see whether or not any of them fulfilled the terms of the bequest of chattels in the testator's will. As a matter of fact, none of them were ever actually in possession or entitled to the receipt of the rents and profits under the limitations of the Resettlement, if these words be taken to connote actual physical possession. But it is said on behalf of Basil that he fulfilled the terms, because he would have become entitled on the death of Emily Charlotte Duncombe in 1930 to the actual possession or receipt of the rents and profits of the Waresley estate but for a supervening event—namely, the execution of the disentailing assurance of 1917, by which the property was prevented from devolving

(1) 32 Beav. 45.

(2) [1910] 1 Ch. 581, 584.

on him. It is said, therefore, that looking at the limitations of the Resettlement alone he was the person entitled to the actual possession, and therefore, under *Hogg v. Jones* (1), the person who fulfilled all the qualifications or conditions imposed by the bequest of chattels.

I want quite shortly to refer to one or two of the relevant authorities. In *In re Petre's Settlement Trusts* (2) Joyce J. had to deal with a limitation which contained the words, "became entitled to the actual possession or the actual receipt of the rents and profits of the Petre estates under the limitations of the Petre settlement," and he made this observation (3), quoting from Vaizey on Settlements, p. 1349: "In several cases tenants in tail in remainder were treated as persons entitled to the possession, so as also to entitle them to personalty, which was in one case to be enjoyed by the persons successively entitled to the possession of the settled realty,' etc.; and Mr. Vaizey suggests the addition of the word 'actual' and the use of the expression 'actual possession' with the idea of preventing any such result as that. Having regard to all this, and to what was said in the judgment in *Hogg v. Jones* (1), which was cited to me, upon the whole I think that 'entitled to the actual possession under the limitations' means here entitled to such possession, looking to the terms of the settlement, and not regarding anything else." It is said by Mr. Harman that that passage confirms *Hogg v. Jones* (1), and that by virtue of that case and of *In re Petre's Settlement Trusts* (2) regard ought not to be had to the effect of the disentailing assurance of 1917, the only matter for consideration being what was the devolution under the settlement of 1874. The case of *In re Fothergill's Estate* (4) illustrates the effect of the word "actual" in regard to such a gift as we are considering. The use of that word in a gift of chattels and its omission in a gift of residuary estate sufficed to cause the chattels and residuary estate to pass to different persons. But the question of the effect of the words "actual possession" does not appear to have been fully

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(2) [1910] 1 Ch. 290.

(3) [1910] 1 Ch. 296.

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C. A. argued there. In *Foley v. Burnell* (1) it is important to note that the person who was held to be entitled to the heirlooms took a vested estate of inheritance in the realty with which they were to devolve. He was absolutely entitled in remainder, and he was held to be entitled to the heirlooms by reason of the fact that he had a vested estate of inheritance in the realty. That fact is not indicated by the sidenote, which appears to be incomplete. Coming back to *In re Parker* (2) it was there argued (3): "Where, as in the present case, the chattels are only annexed to the house, they will, if settled in the same way as the real estate, vest absolutely in the first tenant in tail when he is born: *Foley v. Burnell* (1); *Lord Scarsdale v. Curzon* (4); although the settlor may prevent the rule being applicable by a reference to 'actual' possession, in which case, if the tenant in tail in remainder dies in the lifetime of the tenant for life, the former will not take the heirlooms." Parker J., in giving judgment, said (5): "It is possible to introduce provisions defeating the interest of a tenant in tail who does not come into actual possession of the property; but words which are to have this effect must be reasonably clear and certain. Further, in considering whether the testator has manifested an intention contrary to the ordinary rule, the Court ought not to be influenced by the actual events which have occurred." He distinguished *In re Lord Chesham's Settlement* (6), where the actual words to be construed were that the chattels were to be held and enjoyed with the mansion house.

In considering here the effect of the disentailing assurance and whether or not it is to be taken into account as one of the events which have occurred for the purpose of construing the bequests of chattels in the testator's will, I think it important to bear in mind a passage from Lord Chelmsford's speech in *Lord Lilford v. Attorney-General*. (7) It is true that in that case the question being determined was as to succession duty, but Lord Chelmsford said: "The disentailing deed

(1) 1 Bro. C. C. 274; 4 Bro. P. C. 319.

(2) [1910] 1 Ch. 581.

(3) *Ibid.* 583.

(4) 1 J. & H. 40.

(5) [1910] 1 Ch. 585.

(6) [1909] 2 Ch. 329.

(7) (1867) L. R. 2 H. L. 63, 70.

did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him, to render it perpetual." If that reasoning be right—and it not only appears in the speech in the House of Lords, but is quoted again by Joyce J. in *In re Trevanion* (1)—the disentailing assurance here was not something which supervened unexpectedly or entirely outside the deed of resettlement, but was giving effect to a right which belonged to those persons who took successively as tenants in tail under the deed, a right which they could exercise by virtue of the interest which they took under the deed of resettlement.

I turn now to *Hogg v. Jones*. (2) I quite appreciate the very fair argument which Mr. Harman presented to us, that that case has stood since the year 1863, and has been adverted to in a great number of cases; and he is quite right in cautioning us to be careful ere we set aside a case of that antiquity. But while *Hogg v. Jones* (2) has been referred to and used where it seems to state a doctrine that supports the judgment being delivered, it has also in many books, and in some cases, been criticized as being based on reasoning which it was not possible fully to understand. I will not go through the case in detail, but I call attention to the fact that the words that there had to be construed were, "who for the time being shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will." It is to be noted that those words do not include the word "entitled." Lord Romilly M.R. had to determine whether or not the person in whose favour he decided could be deemed to be in possession, and he held that E. M. Lyte could be treated as being in actual possession, because he would so have been but for a disentailing assurance. His words are these (3): "I think that the words of the will are satisfied by the vesting in the legatee of the right to the actual possession and enjoyment of the real estate. If so, E. M. Lyte is clearly the person entitled to the plate. He is the person

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(2) 32 Beav. 45.

(3) 32 Beav. 54.

C. A. who, under the limitations contained in the will (regarding
 1932 them, and them alone, undisturbed by any foreign cause) is
 DUNCOMBE, entitled to such possession and enjoyment, and which he
In re. would have obtained unless these limitations had been
 WRIXON- defeated by a foreign circumstance over which neither the
 BECHER testator nor the legatee had any control." I find difficulty
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 FAVERSHAM. in accepting those words or agreeing that the disentailing
 Lord Hanworth assurance executed in the circumstances in which it was
 M.R. there executed could be said to be a foreign cause or a foreign
 circumstance as suggested by Lord Romilly. Then he goes
 on to say (1): "I think that my meaning may be illustrated
 by suggesting such a case as this," and he suggests a case
 in which a cottage on the eastern coast has been, by the act
 of God, swept away by the inroad of the sea so as to render
 it impossible for anybody to be in actual possession and
 enjoyment of it. It does not seem to me that the act of God
 would have altered or destroyed the title, and the mere fact
 that he could not go into actual possession and enjoyment
 under those circumstances would surely not be taken to
 militate against a right of which he was otherwise in possession.
 I think the illustration which he gives shows that the sort
 of foreign cause of which he is speaking is one which is certainly
 very different from the disentailing assurance which we have
 in the present case, and if that be not so, then I have reluctantly
 to say, with all due respect, that I cannot agree that the
 disentailing assurance is a foreign cause sufficient to justify
 its being neglected as of no effect when one comes to interpret
 the clause in question. In the passage of time during which the
 testator's will was to operate it was necessary to contemplate
 not only the successions and deaths of a number of persons
 referred to in the deed of resettlement which was confirmed
 by the will and which is in effect referred to in the bequest
 of chattels, but also the exercise by those persons of the
 powers conferred on them successively; and one of those
 powers would be the power to execute a disentailing assurance.
 That power has been exercised, and by virtue of that it
 became impossible for Basil ever to obtain actual possession

or to become entitled to the receipt of the rents and profits of the mansion and demesne of Waresley. It follows, therefore, that his claim to the chattels was defeated unless we are compelled to hold, following *Hogg v. Jones* (1), that he still has a right to them.

I decline to feel bound by *Hogg v. Jones* (1), and I therefore come to the conclusion that our decision ought not to be in favour of Basil. That being so, the right is left to fall between the representatives of Walter Henry Octavius and the representatives of his sister, Emily Charlotte. It is not necessary for us to-day to decide between those persons; it is sufficient for us to say that the appeal must be allowed and the claim of Basil barred; and the order of Luxmoore J. is therefore discharged.

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LAWRENCE L.J. I agree. But for the authorities to which our attention has been called I should have thought that the construction of the bequest in question was fairly plain. It appears from the judgment of Luxmoore J. that he was of that opinion himself, but that he felt bound by *Hogg v. Jones* (1) to place a construction upon the bequest with which he did not agree, and which, in my opinion, is not its true construction.

Before dealing with the main point on this appeal there are two minor points of construction on the bequest which present no real difficulty. In the first place I think that there is an obvious mistake in the will in the use of the expression "under or by virtue of this my will," which plainly ought to be read as if the words "the resettlement" had been substituted for the words "this my will." In the next place I am clearly of opinion that in the expression "in the actual possession or entitled to the receipt of the rents and profits of the mansion house" the words "entitled to the receipt of the rents and profits" mean, entitled to the actual receipt of the rents and profits.

I now turn to the main question whether the learned judge was right in deciding that the representatives of Basil are

C. A. entitled to the personal chattels the subject-matter of the
 1932 bequest. Before Basil ever could have become entitled to the
 DUNCOMBE, actual possession or the actual receipt of the rents and profits
In re. of the settled estates under the limitations contained in the
 WRIXON- Resettlement a disentailing deed was executed and the
 BECHER estates became vested in Emily Charlotte for an estate in fee
 v. simple in possession. In these circumstances I am quite
 FAVERSHAM, unable to see how it could be said that prior to his death
 Lawrence L.J. Basil was in actual possession or entitled to the actual receipt
 of the rents and profits of the estates within the meaning of
 the bequest unless some wholly artificial construction ought
 to be placed on the words used to describe the legatee. That
 question depends upon whether the construction of the
 bequest is governed by the decision in *Hogg v. Jones* (1), and
 if so, whether that decision ought to be followed.

The wording of the bequest in *Hogg v. Jones* (1), although
 not identical with, is very like the wording of the bequest in
 the present case. The bequest in *Hogg v. Jones* (1) was to
 the person "in the actual possession and enjoyment of my
 freehold estates under the limitations of my will," and I
 agree with Mr. Harman that there is no substantial distinction
 between the two bequests. It is necessary to bear in mind
 that neither in the present case nor in *Hogg v. Jones* (1) was
 the gift to the person "*entitled* to the possession" or "*entitled*
 to the actual possession," which are the expressions used in
 some of the other cases cited to us. The words used in the
 present case and in *Hogg v. Jones* (2) are "in actual possession."
 I think therefore that Luxmoore J. was right in holding
 that *Hogg v. Jones* (1) was practically indistinguishable from
 the present case; but in my opinion *Hogg v. Jones* (1) was
 wrongly decided. The reasons given by the learned Master
 of the Rolls in the earlier part of his judgment in that case
 seem to me to point to the conclusion that his decision ought
 to have been the other way. But the ground upon which he
 ultimately based his decision was that as the later limitations
 under the will were defeated by a disentailing deed which was
 a foreign cause over which the testator had no control,

(1) 32 Beav. 45.

(2) 32 Beav. 55.

therefore the words "in actual possession" ought to be given a meaning which obviously they do not bear. I confess I am unable to follow the reasoning on which this conclusion is based. The learned Master of the Rolls (1) says: "The consideration of the cases of *Potts v. Potts* (2) and of *Lord Scarsdale v. Curzon* (3), before the Vice-Chancellor Sir W. P. Wood, confirms me in the view I take; I do not think that the Vice-Chancellor, in that case, intended to draw or establish any distinction between the right to the enjoyment of the estate under the limitations of the will when united to the actual enjoyment of it, and the mere right to such enjoyment when not coupled with the actual possession, where the failure of the actual possession was occasioned by reason of some foreign disturbing causes having destroyed the further operation of the limitations upon the estate devised. Whether such failure be occasioned by a disentailing deed or by natural causes cannot, I think, make any difference. In both cases the right would exist under the limitations of the will taken alone, but in neither case could that right be enforced." From this passage it is plain that the learned Master of the Rolls considered that in spite of the fact that the claimant did not answer to the description of the legatee referred to in the bequest he was entitled to the legacy because he would have answered to that description if the disentailing deed had not been executed. In my opinion that reasoning is unsound and the decision based upon it is wrong. If the person entitled to be in actual possession had been wrongfully kept out of possession such reasoning might have been applicable, but where (as in *Hogg v. Jones* (4) and in the present case) the claimant was lawfully prevented from acquiring any right to enter into possession it does not seem to me to matter whether the cause of his having been so prevented was a disentailing deed or the birth of some person with a prior right to possession or some other supervening cause. In no such case would he answer to the description

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(1) 32 Beav. 55.

(1848) 1 H. L. C. 671.

(2) (1847) 9 Ir. Eq. Rep. 577;

(3) 1 J. & H. 40.

(4) 32 Beav. 45.

C. A. of a person in actual possession or entitled to the actual receipt of the rents and profits.

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Turning again to the bequest in the present case, the language employed is plain and I decline to give it any artificial meaning. Mr. Harman contended that the Court ought to look only at the limitations contained in the Resettlement and at the pedigree, and should ignore the fact that a disentailing deed has been executed. I see no reason why the disentailing deed should be ignored any more than the births and deaths of the prior tenants for life and tenants in tail. The indisputable fact remains that in the events which have happened Basil never did fulfil the requisite condition to constitute himself a legatee under the bequest; and therefore (without going into any of the other cases cited to us) I am of opinion that his representatives are not entitled to the chattels.

For the reasons stated the decision in *Hogg v. Jones* (1) should in my judgment be overruled and this appeal allowed.

ROMER L.J. The will in this case is peculiar in two respects. The first respect in which it is peculiar is in the reference by the testator to his own will, as though that will had in some way limited the Waresley Estates. I think that nothing really turns upon that. The will so far as it had any operation at all upon the Waresley Estates had only this effect, that it confirmed the Resettlement of those estates. It may well be that the testator thought that that confirmation gave a validity to the Resettlement which it did not otherwise possess, and that this was the reason why he referred to "the person or persons who under or by virtue of this my Will shall for the time being be in the actual possession" of the Waresley Estates. Assuming that he did think so and that this was the reason why he referred to the will and not the Resettlement, of course in the end it is the same thing as though he had referred to the Resettlement and not the will.

The other respect in which this will is peculiar is that if the gift had been of the chattels to the person or persons who shall for the time being be entitled to the receipt of the rents and profits of the Waresley Estates, the chattels would undoubtedly have vested in the son of Lady Calthorpe, who became entitled to the first tenancy in tail under the Resettlement. If, on the other hand, the gift had been solely to the person or persons who shall for the time being be in the actual possession of those estates, then but for the disentailing deed, it is quite plain that Mr. Harman's client would now be entitled to the chattels. The testator has however used both expressions. He has given the chattels to the person or persons who for the time being shall be—leaving out the reference to the Resettlement—in the actual possession “or” entitled to the receipt of the rents and profits. In those circumstances if the word “or” be construed as introducing the real alternative, the whole trust would fail for uncertainty. I think therefore that we ought to treat the word “or” not as introducing an alternative, but as introducing words which, in the opinion of the testator, meant the same thing as the words which he had just used. Therefore I read those words as being “in trust for the person or persons who shall for the time being be in the actual possession that is to say in the actual receipt of the rents and profits.” So construing the words, but for the disentailing deed, Mr. Harman's client would be entitled to the chattels. Having regard to the disentailing deed, however, he is not in actual possession, and never will be in actual possession, nor has he got any estate in possession as distinguished from any estate in remainder in the real estate. In other words he does not come within the description of legatees. Mr. Harman however relies upon the words “Under or by virtue of the Indenture of Resettlement.” He says: “Those words make a difference, and although without those words I might not have been entitled to the chattels, yet, I am so entitled having regard to the fact that those words are included.”

Had the gift been to the persons who under or by virtue of the Resettlement should for the time being be entitled to

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C. A. the actual possession, there would be something in the
 1932 argument, for in such a case it might be possible to regard
 DUNCOMBE, those words as not referring to the fact of actual possession,
In re. but to the title to actual possession that would have existed
 WRIXON- under the Resettlement, looking at the Resettlement and that
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A construction of that sort was applied to somewhat similar words by Joyce J. in *In re Petre's Settlement Trusts* (1), where he said (2): "Having regard to all this, and to what was said in the judgment in *Hogg v. Jones* (3), which was cited to me, upon the whole I think that 'entitled to the actual possession under the limitations' means here entitled to such possession, looking to the terms of the settlement, and not regarding anything else." But the words "in actual possession" refer to a fact and not a title, and seeing that Mr. Harman's client is not in actual possession, it is useless to go further. He does not fulfil the first branch of the description.

In the case of the lady, who did become eventually entitled to the actual possession of the estates, it would have been necessary, had we now to decide that point, to go further and to consider whether she was so in possession under or by virtue of the Indenture of Resettlement. In Mr. Harman's case it is not necessary to go further because, not being in actual possession, he does not come within the first words of the description. That being so, I should unhesitatingly decide, as Luxmoore J. would unhesitatingly have decided, against the claim of Mr. Harman's client were it not for the decision in *Hogg v. Jones*. (3) *Hogg v. Jones* (3) is a very unsatisfactory case. It has been criticized by the Master of the Rolls and by Lawrence L.J., and I do not want to repeat their criticisms. I merely venture to point out that there are other matters in respect of which the case lays itself open to most severe criticism. Lord Romilly M.R. first decided against the claims of the disentailing tenant in tail on the ground that his tenancy in tail was defeasible during the whole period of his life, as indeed it was. But in point

(1) [1910] 1 Ch. 290.

(2) [1910] 1 Ch. 296.

(3) 32 Beav. 45.

of fact it was the first tenancy in tail in remainder that took effect, and it was impossible to defeat his claim on that ground. His claim was defeated and properly defeated on the ground that he never was in actual possession. It could not have been defeated on the ground that during his life his estate tail was defeasible.

Then dealing with the claim of E. M. Lyte, who was a tenant in tail by descent, he says this (1): "I think that the words of the will are satisfied by the vesting in the legatee of the right to the actual possession and enjoyment of the real estate. If so, E. M. Lyte is clearly the person entitled to the plate. He is the person who, under the limitations contained in the will (regarding them, and them alone, undisturbed by any foreign cause) is entitled to such possession and enjoyment." There is the sort of argument which was applied by Joyce J. in *In re Petre's Settlement Trusts* (2), and in support of which there may be a good deal to be said; but with great respect to Lord Romilly, he had not got the word "entitled" before him. He had the words which we have here "in the actual possession." Having said that he goes on as follows (3): "It is plain, as was well put by Mr. Druce, that the disentailing deed, which has no operation over chattels, could not in any degree affect the devolution of them; they must go exactly as if such deed had never been executed." With great respect to the learned Master of the Rolls, he is confusing the case where chattels are settled by reference upon trusts similar to the trusts which have been declared in respect of real estate or to the uses which have been limited in respect of real estate, with cases like that before him and before us, in which the chattels are directed to go with the real estate, and to go to the persons who, under the limitations of the real estate, from time to time become entitled, whether in possession or actual possession matters not for the moment. In such a case the devolution of the chattels is affected by the act of disentailing, because the limitations of the realty are affected by that act.

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(1) 32 Beav. 54.

(2) [1910] 1 Ch. 290.

(3) 32 Beav. 55.

C. A. For these reasons it seems to me that *Hogg v. Jones* (1)
 1932 ought not to be followed, and must be overruled, and that
 DUNCOMBE, this appeal must accordingly be allowed.
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Appeal allowed.

Solicitors: *Trower, Still & Keeling; Evans, Barraclough
 & Co.*

H. C. G.

FARWELL
 J.

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[1931. J. 2939.]

*Will—Infant—Contingent Legacy by Parent—No Provision for Maintenance—
 Contingency not referable to Attainment of Full Age—Interest on Legacy—
 Applicable to Maintenance—Discretion of the Court.*

Where a testator, being the parent (or in loco parentis) of an infant, gives a legacy to that infant, contingently on his attaining an age other than full age, and makes no provision for maintenance, it is within the discretion of the Court to order the interest on the legacy to be applied in maintaining the legatee until the legacy vests.

ADJOURNED SUMMONS.

The testator, by his will dated May 16, 1927, appointed the plaintiffs, together with the defendants, his wife and his daughter Dachie Iris Jones, if and when she should attain the age of twenty-one years, to be his executors and trustees. By clause 6 of his will the testator declared as follows: "Without creating any obligation so to do it is my wish and desire that my trustees should in their sole and absolute discretion provide a place of residence or home in Cardiff for the use of my said four children or any of them and my said wife Anna whilst my widow and while such children are under

the age of 25 years respectively but so that my trustees shall not be bound to provide such residence or home after my said children have attained the age of 25 years or in the event of my said wife Anna remarrying." His Lordship held that that clause did not place an obligation upon the trustees to maintain the home, but it undoubtedly gave them a discretion which they could, if they thought fit, exercise with regard to the matter. By clause 7 the testator provided that: "Having purchased in the name of my son Fred by way of gift to him (which gift I hereby confirm) War Savings Certificates of the value of 500*l.* at the time of purchase, which certificates upon maturity will yield or bring in the sum of 650*l.*, and in order to place my other three children on an equal basis with my son Fred in respect thereof I bequeath to each of my three children Dachie Iris, Constance Margaret and Albert the sum of 650*l.* which amounts shall be appropriated for them when the said War Savings Certificates mature so as to bring in the sum of 650*l.* as aforesaid." By clause 8 the testator directed his trustees to keep on foot certain policies, and by clause 9 he provided that: "It is my wish that each of my children should have the sum of 2500*l.* (in addition to any other monies hereby given to them) and having already provided by clause 7 of this my will for 650*l.* to each of them I accordingly bequeath to each of my said children . . . the sum of 1850*l.* if and when each of them attains the age of 25 years and upon the same trusts and conditions as are hereinafter contained concerning their respective shares of and in my residuary estate." By clause 10 the testator gave, devised and bequeathed the whole of the rest of the residue of his property to his trustees upon trust to sell, call in and convert the same, and, by clause 11, out of the proceeds of such sale and conversion to pay his debts, legacies, and testamentary expenses, and to stand possessed of the residue upon the following trusts: "(a) Upon trust to retain thereout the sum of 1000*l.* and 1000*l.* to be expended by my trustees upon the education and maintenance of my two sons Fred and Albert respectively at school, and such part thereof as shall not have been

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expended by my trustees as aforesaid, together with any accumulated income thereon, shall be paid over to my said two sons respectively on their attaining the respective ages of 25 years, provided however, that if either of my said two sons shall not attain the age of 25 years then any monies unexpended as aforesaid, together with any accumulated income thereon shall fall into and form part of my residuary estate, and it is my earnest wish and desire that each of my said two sons shall be educated in such a way with the object ultimately of sitting and passing the London Matriculation Examination, and for which examination I desire each of them to sit. (b) Upon trust to pay each of my four children . . . if and when each of them attains the age of 25 years the sum of 2500*l.* (in addition to the monies bequeathed to each of them by clause 9 of this my will or otherwise). (c) Upon trust to divide the remainder of my residuary estate into five equal parts and to pay one of such parts to my wife Anna if she shall remain my widow . . . and to pay the remaining four parts to my said four children . . . in equal shares, share and share alike if and when each of them attains the age of 25 years." Then there was an advancement clause (clause 11 (f)), in which the testator provided that: "My trustees may at their discretion raise any part or parts not exceeding together one moiety of the vested or presumptive share of any child or grandchild of mine under this my will and apply the same for his or her advancement, preferment, or benefit as my trustees shall think fit."

The testator died on June 3, 1927, leaving his wife and his four children, all of whom were infants, by his first wife him surviving.

This summons was taken out for the purpose of ascertaining (inter alia) whether the gifts to the testator's children, contingent on their attaining the age of twenty-five years, should bear interest and, if so, at what rate.

G. R. Upjohn for the plaintiffs.

R. W. Turnbull for the widow of the testator. There is nothing in either s. 175 of the Law of Property Act, 1925

(15 Geo. 5, c. 20), or under s. 31 of the Trustee Act, 1925 (15 Geo. 5, c. 19), altering the old law that a contingent or future pecuniary legacy payable to an infant upon attaining twenty-one does not carry intermediate income: *In re Raine*. (1) To that law there are three exceptions: (1.) Where the legatee is an infant child of the testator or an infant to whom the testator has placed himself in loco parentis and the will provides no other maintenance; (2.) If the infant legatee is a stranger, but the income is given for maintenance, interest runs from the death; or (3.) If a general intention is expressed of providing for the maintenance of the infant legatees: see Theobald on Wills, 8th ed., pp. 205-6. The first exception is applicable only where the legacy is contingent on the infant's attaining the age of twenty-one years or previous marriage (see *In re Abrahams* (2)), consequently it does not apply in this case, the contingency being on the children attaining the age of twenty-five years. The second exception is inapplicable, because in the present case the income is not given for maintenance. The third exception could only apply if the advancement clause can be construed as a maintenance clause, which it certainly is not: *In re Churchill*. (3) Moreover, this exception is subject to an exception that the intention cannot be presumed where the testator makes provision for the maintenance of the legatee out of some other fund other than the future legacy, as is done in the present case: *In re West*. (4)

Fergus Morton K.C. and *R. F. Roxburgh* for the infant children. The legacies of 1850*l.* given by clause 9 of the will do carry interest: see s. 31, sub-s. 3, of the Trustee Act, 1925. The decision in *In re Abrahams* (2) is contrary to other decisions, but even if the Court feels bound to follow that decision on general principles there is enough in this will to show that the testator meant the legacies to carry interest: see judgment of Vaughan Williams L.J. in *In re Bowlby*. (5) It is difficult to follow the reasoning that if vesting of a legacy

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(1) [1929] 1 Ch. 716.

(3) [1909] 2 Ch. 431.

(2) [1911] 1 Ch. 108.

(4) [1913] 2 Ch. 345.

(5) [1904] 2 Ch. 685, 697-8.

FARWELL J. is postponed to the age of twenty-five, maintenance is not intended. In this case clause 6 of the will is meaningless if
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 JONES, *In re.* *In re Abrahams* (1) is to be followed strictly. *In re George*
 MEACOCK *v.* *JONES.* *In re Churchill* (4) were all cases where the legacies vested at twenty-one. The
 clause in *In re Churchill* (4) is similar to clause 11 (f) in the
 present will. This case is not governed by *In re Abrahams* (1)
 at all.

Turnbull replied.

FARWELL J. The question which I now have to determine upon this will gives rise to an interesting and, I think, difficult problem—namely, whether the legacies or any of them given to the four children, which are in every case contingent upon the children attaining the age of twenty-five years, carry interest before that date, that is to say, before they attain the age of twenty-five years. The general rule of construction in regard to contingent legacies is that such legacies do not carry interest until the time for payment. But there are undoubtedly exceptions to that general rule. One of the exceptions is where the legatee is an infant child of a testator or an infant to whom the testator had put himself in loco parentis. In such cases a contingent legacy may carry interest if there is no other provision made by the will for the maintenance of the legatee. But it is said on the authority of a decision of Eve J. that there is an exception to that exception—namely, that the exception only applies where the contingency is the attainment by the child of full age, or marriage under that age, and that if the contingent legacy given by the parent to the child who is an infant is contingent upon the child attaining some age later than twenty-one, then under no circumstances will the Court hold that the legacy carries interest. There is also another exception to the general rule in the case of legatees who are strangers to the testator, that is, persons who are neither children nor persons to whom the testator

(1) [1911] 1 Ch. 108.

(2) (1877) 5 Ch. D. 837.

(3) [1895] 1 Ch. 101.

(4) [1909] 2 Ch. 431.

was in loco parentis, which is, that if the Court can find a general intention to provide for the maintenance of the legatee, then interest runs from the death, notwithstanding that the legacy is contingent. But such intention cannot be presumed where the testator has made a provision for the maintenance of a legatee out of some other fund. So far as I am aware, in all the reported cases of contingent legacies to strangers in which the Court has held that the legacies carry interest, because of the intention expressed by the testator in his will to maintain the legatees, the contingency was the attainment of twenty-one years or marriage under that age. There appears to be no reported case where the Court has been able to infer an intention to maintain and, therefore, to give interest on the contingent legacy to a stranger when the contingency was some event happening after the infancy of the legatee. Under those circumstances what is the true view: Is this a case which comes within the general rule, or is it within the first exception which I have mentioned? Is it a case where I have to look at the will itself to find the intention of the testator and give effect to it, or must I say that the decisions prevent me, whatever my view may be as to the intention of the testator, from holding that these contingent legacies carry interest because they are payable at twenty-five and not at twenty-one? The exception to the general rule has been stated with great clearness in the judgment of Vaughan Williams L.J. in *In re Bowlby*. (1) It is not necessary for me to refer to that case beyond making reference to the passage in the judgment which deals with the general law. The learned Lord Justice says (2): "I propose now to deal with the question of the general law under which the will of a father giving a legacy to a child, either not payable till a future date, or contingent on the happening of a future event, is so construed as to make a provision for the child's maintenance by making the child's legacy carry interest. There can, to my mind, be no doubt but that the language used in the cases in which this canon of construction was first established

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(1) [1904] 2 Ch. 685.

(2) [1904] 2 Ch. 697-8.

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is language apt for the gift to the child legatee of interest on the legacy payable in futuro or contingently during the interval between the parent's death and the arrival of the time or the happening of the event on which the legacy is made payable. Thus in *Green v. Belchier* (1) Lord Hardwicke said: 'In such a case interest by way of maintenance would certainly be allowable in the meantime; it being a constant rule in equity, that wherever a legacy is given by a father to a child, as a provision for such child, though the legacy be payable at a future day, yet the child has an immediate right to the interest of the money; if the legatee was a stranger to the testator, it would be otherwise.' The words in *Beckford v. Tobin* (2) and *Crickett v. Dolby* (3) are all of a similar character.

"The child's legacy is said to bear interest or carry interest. It will be found that this sort of phraseology is used equally in modern cases. Take, for example, *In re George* (4), in which James L.J. said: 'But the rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing in loco parentis to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose.' " Now it will be noticed there that the learned Lord Justice in stating in that precise language the rule of construction, does not limit it in terms to cases where the contingency is the attaining of twenty-one years by the legatee, and I can find nothing in that statement of the law by the learned Lord Justice which prevents the Court from coming to the conclusion that in a proper case interest may be payable on a contingent legacy given to an infant by a parent, notwithstanding that the contingency is not the attainment of full age. It is said, however, that Eve J. in *In re Abrahams* (5) has determined that very question. It

(1) (1737) 1 Atk. 505, 507.

(3) (1795) 3 Ves. 10.

(2) (1749) 1 Ves. Sen. 308.

(4) 5 Ch. D. 837, 843.

(5) [1911] 1 Ch. 108.

is true that in that particular case the learned judge came to the conclusion that since the legacies were contingent upon the sons attaining the age of twenty-five the legatees were not entitled to interest on their legacies. The ratio decidendi of his decision was that in the case of a parent giving to an infant a contingent legacy payable on the attainment of full age or marriage under that age and making no other provision for that child's maintenance, the Court is able to infer an intention that the child should have interest on the legacy, because presumably the parent intends to fulfil his legal obligation to maintain the child whilst an infant, but he felt that there was a very grave difficulty in drawing any such inference where the legacy, although given to an infant, was not contingent upon the attainment of twenty-one, but some other and a later event. In the passage in his judgment to which I refer he says (1): "I agree that the matter is left somewhat in doubt as to whether maintenance is allowed and treated as interest on the legacy or whether interest is allowed and maintenance given thereout. But this much I think is clear from the historical examination of the cases through which Mr. Levett has taken us, that the exception had its origin in the desire of the Court to give effect to what the Court presumed must have been the intention of the testator, that is to say, to provide for the maintenance of the infant, an intention which might well be presumed in cases where the suspensory period was limited to the years when the infant would in the ordinary course require to be maintained, but which could not be presumed as readily, if indeed at all, where the legacy was made contingent upon events having no reference to the infancy of the legatee, and in this connection it certainly is remarkable that in all the cases to which my attention has been directed the contingencies have been the attainment by the child of full age or marriage under that age. There is no case in which I can see that the exception has been held to apply when the contingency is anything but the attainment of full age or marriage under that age.

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(1) [1911] 1 Ch. 108, 115.

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“In that state of things and bearing in mind that I am dealing with an exception engrafted on a general rule, ought I to be the first judge to hold that the exception extends so as to include contingencies of every description and having no relation to the attainment of full age? I do not think I ought to be. I think I ought to treat the exception as limited to those cases in which the contingency is the attaining of full age or previous marriage and to hold that, where the testator has made the legacy payable upon a contingency which has no reference whatever to the attainment of full age, the case ought to be treated as governed by the general rule and not as coming within the exception.”

Now, as I understand it, Eve J. was taking the view that it would be extremely difficult for the Court to presume an intention by the testator that the contingent legacy should carry interest in favour of an infant child of the testator in any case where the contingency was the happening of some event later than the attaining of twenty-one, or a marriage under that age, and that at any rate in the case before him he was not prepared to hold that there was any such intention. It is to be noticed that in the case with which Eve J. was dealing (*In re Abrahams* (1)), there was not, as far as I can see, anything which could assist him in drawing the inference that the testator intended that the legacy should carry interest, except the mere fact that it was a contingent legacy given to an infant child of the testator. I do not think that the will contained anything else which would have enabled the Court to come to the conclusion that there was an intention that the children should be maintained out of the interest on the legacies.

○ The principle of the cases which have been cited, as I understand it, is this: the general rule that a contingent legacy does not carry interest does not apply in a case where the contingent legacy is given by a parent to a child who is an infant, because the Court infers that the testator intended that the child should be maintained, and, if no other due provision is made for maintenance, the Court will presume

(1) [1911] 1 Ch. 108.

that the testator intended the child to be maintained out of the only fund available—namely, the interest on the contingent legacy, but in all the reported cases the inference has only been drawn where the contingency was the attainment of full age or marriage under that age. That being so, am I precluded, however clearly I may think that the testator has shown by his will his intention that the infants should be maintained out of the interest on the contingent legacies, from giving effect to that intention, or, putting it in another way, is it impossible for me to hold that there can be any such intention expressed in the will because the legacies are contingent upon the infants attaining the age of twenty-five years? I have carefully considered this question, especially having regard to what Eve J. has said in the case already referred to, and I have come to the conclusion that I am not so precluded.

There is certainly nothing in the general statement of the law by Vaughan Williams L.J., quoted above (1), or in any of the other cases to which I have been referred, which in terms decides this question. The only case which it can be suggested might prevent me coming to such a conclusion is the case before Eve J. (2) But in Eve J.'s judgment I do not think that there is anything that precludes me from coming to that conclusion because, as I read his judgment, what he is saying is: Where the suspensory period is the attaining of twenty-one, there is no difficulty in the Court inferring the intention that the child should be maintained out of the interest on the contingent legacy, but where the contingency is the attainment of a later age, then there is a great difficulty in the Court drawing such an inference, but I do not think that he intended to decide finally that in no case could such an inference be properly drawn.

In my judgment the true view is this: where a contingent legacy is given to an infant, a child of the testator, and no other proper provision made for maintenance, and the legacy is contingent on the attaining of twenty-one or marriage, the infant is entitled to interest, because the Court presumes that

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(1) [1904] 2 Ch. 697-8.

(2) [1911] 1 Ch. 108, 115.

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the testator intended to maintain his child, and, as he has made no other provision for it except the interest on the contingent legacy, the Court infers that he must have intended interest to be payable accordingly. But that presumption, or that inference that the Court will draw with regard to the testator's intention in such a case, is rebutted if the Court finds that there is other due provision made for the maintenance of the legatee, because in such a case there is no room for the Court to infer an intention that the infant shall be maintained out of the interest on the contingent legacy. Now if that be the true reason why the Court is able to give an infant, who is a child of the testator, interest on a contingent legacy, it seems to me that the same reasoning must enable the Court in a proper case to say that a contingent legacy given to an infant, who is a child of the testator, may carry interest, although the contingency is one which may happen after the attaining of twenty-one. Of course, in a case where the contingency was some event happening long after the child attained twenty-one, the Court would be very slow, and would in most cases probably find it impossible, to draw any such inference at all, and in any case in my judgment it must always be difficult for the Court to draw such an inference where a legacy is contingent upon the happening of some event later than the attainment of full age. But in my judgment the Court is not precluded in a proper case from drawing such an inference. Now, ought I to draw any such inference in this case? In my judgment I ought, but only to a limited extent. In the first place it is to be noted that there is no due provision made for the daughters at all except on attaining twenty-five. In this case it is obvious in my judgment that the testator looked upon the period during which a child would require maintenance as continuing up to the age of twenty-five years. I think that by his will he has shown a clear intention that his daughters at any rate will require maintaining until they have attained twenty-five years. A very strong indication of that is to be found in clause 6, which provides that if the trustees think right they shall provide a home for the children

until they attain twenty-five ; no provision being made for the upkeep of such a home unless it can be provided for out of the interest on these legacies. There is, in my judgment, in this will a clear indication of two things : (1.) that there is to be an income available for this house if the trustees think fit to provide it, and (2.) that the children may need the home until they are twenty-five years of age. Then one finds the obvious desire in this will to provide more or less equally, so far as possible, for the various legatees. Looking at the will as a whole I have come to the conclusion that there is a clear intention that the infants shall be maintained out of the income of the contingent legacies, except in those cases where express provision for maintenance is made. In clause 11 (*a*) there is such an express provision made. It is true that it is in terms limited to the education and maintenance of the two sons respectively at school. But there is a clear provision made that there is to be 1000*l.* apiece for the two sons, which is to be applied for their education and maintenance, and I do not think that the trustees are precluded from providing out of that sum for them during their holidays, because so long as they are at school they must be maintained both at school and in the holidays. Therefore it seems to me that, so far as the two sons are concerned, there is no room to find an intention by the testator that the legacies were to carry interest, because he has expressly provided otherwise, and moreover, to so hold would be contrary by the clearly expressed intention of the testator to equalize matters, which would be largely defeated if the two sons were to have 1000*l.* apiece, and also to have maintenance out of the legacies.

It seems to me, therefore, that so far as the two sons are concerned, I cannot come to the conclusion that they are entitled to interest on the contingent legacies.

So far as the two daughters are concerned, there is no other provision by the will for their maintenance. There is the clearest expression of intention by the testator that they are to be maintained, and, that being so, I am entitled in my judgment, notwithstanding that the legacies are not payable

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FARWELL until twenty-five, to hold that those two legacies carry
J. interest, and that they carry interest at the rate of five per
1932 cent., which will be payable to each daughter until she attains
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Solicitors: *Bell, Brodrick & Gray, for Cousins, Botsford & Co., Cardiff; Wrentmore & Son, for Phoenix, Levinson & Walters, Cardiff.*

P. J. B.

FARWELL THE OCEAN COAL COMPANY, LIMITED v. THE
J. POWELL DUFFRYN STEAM COAL COMPANY,
1932 LIMITED.
March 11.

[1932. O. 156.]

Company—Private Company—Restriction on Sale of Shares—First Offer to Members—Offer of Block of Shares—Acceptance of Part of Block not Good.

By the articles of association of the T. Company, a private company, any member desiring to sell any of his shares must notify the Board of the number of shares, the price, and the name of the proposed transferee, and the Board must offer to the other shareholders the number of the shares offered at the price, and if the offer is accepted the shares shall be transferred to the acceptors. It is provided that "if the shares or any of them are not so accepted the holder may sell or transfer them or any of them at the same or any higher price . . . to third parties approved by the Board."

The capital of the T. Company was 600,000*l.* in 600,000 shares of 1*l.* each, which shares were held in equal parts by the O. Company and the P. Company. The P. Company gave notice to the Board that they were desirous of selling 135,000 of their shares to third parties at the price of 2*l.* per share. The Board offered the 135,000 shares to the O. Company, and the O. Company desired to exercise their option as regards 5000 shares only at the proposed price. The P. Company contended that the whole of the 135,000 shares must be accepted, and that the acceptance of 5000 shares was not good:—

Held, that the proposed acceptance was not good and that the P. Company were entitled to sell the whole 135,000 shares to third parties; that the offer was of the whole 135,000 shares at a certain price per share, and not of 135,000 separate shares at that price; that the price to be paid for the whole number of shares might well be less than that payable for a lesser number; and that an offer must be accepted according to its terms.

THE Taff Merthyr Steam Coal Company, Ltd. (hereinafter called "the Company"), was incorporated on September 25, 1922, under the Companies Acts, 1908 to 1917. It was a private company promoted by the Ocean Coal Company and the Powell Duffryn Steam Coal Company for the purpose of acquiring and working a mineral area in South Wales. The capital of the Company was 400,000*l.* in 400,000 ordinary shares of 1*l.* each. By clause 38 of the articles of association of the Company it was provided that the ordinary shares should be divided into two classes of 200,000 shares each, of which one class, described as Class A, should be issued to and held by the Ocean Coal Company, and the other class, described as Class B, should be issued to and held by the Powell Duffryn Steam Coal Company.

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On January 15, 1926, the Company passed an extraordinary resolution that the capital of the Company should be increased by the creation of 200,000 further ordinary shares of 1*l.* each, ranking for dividend and in all other respects *pari passu* with the existing ordinary shares, and that 100,000 of such additional shares should be Class A shares, and should be issued to the Ocean Coal Company, and that the other 100,000 of such additional shares should be B shares, and should be issued to the Powell Duffryn Steam Coal Company. All these additional shares were duly issued, and at the present time 300,000 shares in the Company are held by the Ocean Coal Company and 300,000 shares in the Company are held by the Powell Duffryn Steam Coal Company.

The Company being a private company special provisions were made in the articles of association with regard to the sale or transfer of shares, and art. 39 was in the following terms:—

39 (1.): "The registered holders for the time being of shares in the Company shall be entitled to sell or transfer their shares of the same class to any other or others of the registered holders of shares in such class, but not to any other parties except subject to the following restrictions:

(a) "The holder of any shares in any class desiring to sell or transfer any of his shares in such class to any person other

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than a registered holder of shares in the same class shall notify in writing to the Board the number of shares proposed to be transferred, the price proposed, and the name, address and description or quality of the proposed transferee (if any).

(b) " Within 28 days of receipt of any such notice as aforesaid the Board shall offer the shares comprised therein to the other shareholders in the Company at the price so named by notice specifying the number of shares offered, the price, and the time, not being less than 14 days or more than 21 days, within which the offer must be accepted or will be deemed to be declined.

(c) " The shares shall be sold to the parties so accepting the offer, and shall be transferred to them by the holder against payment of the price. If the total number so accepted is larger than the number offered, the shares shall be appropriated to the parties accepting in proportion to the number of shares already held by them respectively, if they are willing to take them, but with preferential and proportionate appropriation to persons accepting who are already holders of shares of the same class as those offered.

(d) " If the shares so offered or any of them are not so accepted the holder may sell and transfer them or any of them at the same or any higher price (but not at any lower price without being again offered in like manner as above mentioned) to third parties approved by the Board, which approval the Board may give or withhold as they think fit, without being bound in any case to assign any reason for their decision, and no transfer of such shares shall be made or registered without such approval."

Clause 2 of the article made provision for the case of shares passing on death or by operation of law to some person in a representative capacity, but does not affect the subject of the present report.

In October, 1931, the Powell Duffryn Steam Coal Company was desirous of selling some of their B shares to an outside body, and on October 12, 1931, pursuant to art. 39, they gave notice to the Board of the Company that they were desirous of selling and transferring 135,000 B shares to Stephenson,

Clarke and Associated Companies, Ltd., its subsidiary company, FARWELL J.
at the price of 2*l.* per share.

On October 29, 1931, the Company informed the Ocean Coal Company that the Board of the Company had considered the aforesaid notice, and that it had been resolved in accordance with art. 39 that the 135,000 B shares should be offered to the Ocean Coal Company, being the only other shareholders in the Company, at the price of 2*l.* per share, and informed them that such offer must be accepted on or before November 17, 1931, or it would be deemed to be declined.

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On November 10, 1931, the Ocean Coal Company informed the Company that they had resolved to exercise their option to purchase, in accordance with art. 39, in respect of 5000 of the B shares which the Powell Duffryn Company desired to sell at the price of 2*l.* per share. This information was conveyed to the Powell Duffryn Company by the Company, and on November 23, 1931, the Powell Duffryn Company informed the Company that they were not prepared to transfer to the Ocean Coal Company 5000 out of the 135,000 B shares of the Company which they proposed to sell, and that they were advised that under art. 39 any acceptance (whether by one shareholder or more) must be of the whole of the shares offered and not of a part thereof.

On January 18, 1932, the Ocean Coal Company issued this summons, asking for a declaration that on the true construction of art. 39, and in the events which had happened, the plaintiff company were entitled to apply for and have transferred to them, at the price of 2*l.* per share, 5000 of the 135,000 B shares of the Company which the Powell Duffryn Company had on October 12, 1931, given notice to the Company of their desire to sell.

Fergus Morton K.C. and *Charles Romer* for the Ocean Coal Company. The whole object of art. 39 is to prevent the introduction of outsiders into the Company. If the contention of the defendants is right then, supposing that 50,000 shares were offered at 2*l.* a share, and members of the Company accepted all these shares, except 50 or 100, the vendor could

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sell the whole of the shares to an outsider though members of the Company were desirous of taking up all except a very few shares. We contend that clause (d) only applies to the shares which are not taken up and does not apply to all the shares offered. Clause (c) contemplates the case where different members were willing to take up more than the number of shares offered, and is not applicable if it was intended that the shares should be sold only as a block. In clause (d) the provision that the holder may sell "the shares or any of them," only refers to the previous expression, "if the shares so offered or any of them are not accepted." Clause (c) having dealt with the case of more shares being accepted than were offered, we submit that clause (d) deals with the case, all the shares offered not being accepted, and provides that any shares not accepted may be sold to an outsider. That is in accordance with the sense which one would expect following clause (c). That is in accordance with the general purpose of the article and, we submit, with the wording of the article. It is not a case where there are any authorities which may help the Court, but we say that on the reasonable and fair construction of the article the plaintiffs are entitled to take up any of the shares offered which they desire without being compelled to take up the whole block or to leave it to be sold to outsiders.

Gavin Simonds K.C. and J. H. Stamp for the defendants.

There never was an offer of 5000 shares and our clients would never have made such an offer. If that be so, it appears that there would be something strange in an article which imposes on a member desirous of selling 135,000 shares the obligation to sell 5000 shares only. It is clear that if a member is bargaining with an outsider for the sale to him of shares, the price must be to some extent determined by the number of shares in question, and you cannot predicate that the purchaser will pay the same price for a lesser number. It might be that the number to be sold would be sufficient to transfer the control of the Company, and, if so, the proposed purchaser would not be ready to pay the same price for a smaller number, even if he were willing to take the smaller

number at all. Is there anything in the articles to justify what the plaintiffs claim? Under clause (b) of art. 39 (1.), it is clear that only one thing is permissible, to accept or refuse the offer made; that is, the offer of the shares the vendor wishes to sell. Then in clause (c) we say that the ordinary law of contract is applied and the acceptance must be in the terms of the offer, and you cannot impose upon the offerer a bargain different from what he has offered. But the plaintiffs say that clause (d) is ambiguous and displaces the view of the meaning of the article which we suggest. But we say that the meaning of clause (d) is, that if any of the shares offered are not accepted the holder may transfer the whole, or any of them, as he thinks fit, to third parties at the same or a higher price. The literal meaning of the clause is not that any of the shares accepted must be transferred to the acceptors, but that if any of the shares are not accepted the holder is at liberty to do as he likes with the whole of the shares offered. It would be wrong and might work hardly in many cases, as in the present one, to impose on a vendor an obligation which would deprive him of the bargain he has made with a third party. If the plaintiffs' view had been intended it would have been easy so to have framed the article, and you will find in Palmer's Company Precedents forms that would effect this.

Fergus Morton K.C. in reply. What my learned friends have said as to getting control of the Company is irrelevant and beside any point which your Lordship has to decide. I do not found my claim upon clause (d), but upon clause (c). If there are, say seven members, the Board must offer each of them the 135,000 shares. If one member says, I will take 50,000 shares, I say that under clause (c) these must be transferred to him, but my friends' submission means that every one of the members must say, I will take the whole 135,000 shares, otherwise the acceptance is bad. Clause (d) may mean, I submit, either that the shares not accepted may be sold, or that even if only one share is not accepted, the whole block may be sold outside. I contend that the first construction fits with clause (c), and that the other construction

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does not fit. The point taken as regards the hardship of the vendor not getting as much for a less number of shares is inherent in a private company with restrictions on the sale of shares. The Court has either to put a reasonable and consistent construction of the article, or one that gives an artificial and startling result. I submit that an offer has been made and properly accepted as to the 5000 shares.

FARWELL J. [after stating the form of the summons :] The material facts are these : The Taff Merthyr Steam Coal Company is a company which was incorporated in 1922, it is a private company and was promoted by the plaintiff and defendant companies. The capital is now 600,000*l.* in 600,000 shares of 1*l.* each, which is divided into two classes of shares, A shares and B shares. The plaintiff company are the registered holders of the A shares, that is 300,000, half of the whole capital. The defendant company are the registered holders of the other half, 300,000 B shares. As I have said, the Company is a private company, and its articles contain provisions against the transfer of shares to outsiders without an offer being first made to the other shareholders of the Company.

I must consider in a moment the terms of the relevant articles. What has happened in this case is this : The defendant company are desirous of disposing of 135,000 of the B shares, which they hold in the Company, at the price of 2*l.* per share, and in accordance with the articles they informed the Company of that. In reply to the notice given to the Company, the plaintiff company, who are the other shareholders, gave notice that they desired to purchase 5000 of the shares which were offered by the defendant company at the price of 2*l.* per share. The defendant company say : " We are not under any obligation to transfer at that price to the plaintiff company 5000 of the shares, because that is not the offer which we made. The offer which we in fact made has not been accepted ; it is now open to us to sell all these shares to an outsider." The plaintiffs on the other hand say : " No, that is not the true position.

On the true construction of the articles we must be treated as having been offered 5000 shares at 2*l.* per share, an offer which we have accepted, and accordingly we are entitled to have those shares transferred to us, and the defendants are bound to transfer to us the 5000 shares at that price, and they cannot refuse to do so, and transfer the whole of the shares to an outsider." That is the position, and the only question is which of those two contentions is the right one, and that must depend upon the true construction of art. 39 of the Company's articles of association. [His Lordship then read art. 39 (*a*), and continued:] Pausing there for a moment, the obligation on the shareholder who desires to sell his shares in a case such as the present is to notify to the Board in writing the number of shares which he offers for sale, and the price of such shares, and the name and address and description of the proposed transferee. If the language is to be construed with complete strictness, the price proposed must be the price proposed for the total number of the shares; that is to say, it is the price per share, but it is a price calculated on the total number of shares which are being offered for sale. There may be, as has been pointed out by Mr. Simonds, a considerable difference between the price at which a shareholder is willing to sell his shares, if he is desirous of selling a large or small number, and the price which he obtains for his shares may vary according to the number of shares he is proposing to sell. If one takes the illustration which Mr. Simonds put of an offer of shares sufficient to give control of the Company, it may well be that a purchaser would be prepared to pay a much higher price for a number of shares sufficient for that purpose, whereas he would not be willing to pay such higher price if the number of shares was reduced below the necessary number. Therefore, it seems to me that, read strictly, at any rate, the price proposed is the price proposed for the total number of shares proposed to be sold. [His Lordship then read art. 39 (*b*), and continued:] What in (*b*) is the meaning of the words, "the offer"? Are there 135,000 separate shares offered, or is it an offer of one block of 135,000 shares? If I am to accept the plaintiffs'

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construction, I must, as it seems to me, treat the word "offer" there as meaning a separate offer of each of the shares which are being offered for sale, but strictly the offer is not an offer of anything more or less than one block of 135,000 shares. That is the offer which is made under (b). The transferor says: "I am willing to sell 135,000 shares at a price of 2*l.* per share." He is not, in my judgment, saying: "I am willing to sell one share at 2*l.* up to the total number of 135,000," which is the way in which the plaintiffs ask me to read this article. That is not, in my judgment, the offer which is made. Then I come to sub-clause (c): "The shares shall be sold to the parties so accepting the offer, and shall be transferred to them by the holder against payment of the price." There again the offer, as I have already said, is an offer of a block of 135,000 shares; it is not an offer of each share at 2*l.* a piece up to and not exceeding 135,000 in all. It is an offer to sell 135,000 shares, and that is an offer which must be accepted, and can only be accepted, in my judgment, by one or more persons, who conjointly say: "We will take a transfer of the 135,000 shares." I am not impressed by Mr. Morton's argument with regard to one member being prepared to take up a certain number of shares, because, as I read this clause, if offers can be obtained from members of the company which together make up the total amount that is being offered for sale, then, of course, the vendor must accept that offer. He cannot then say: "I will not take the offer, because it is an offer, not by one member to take up the whole 135,000 shares, but by different people who together offer to take up the total amount." In my judgment the offer is not accepted within the meaning of the article unless one or more members agree to take up the whole number offered. Art 39 (1.) (c) provides for what is to happen if the total number of shares so accepted is larger than the amount offered, but I do not think that that assists me in the question which I have to decide. Then I come to sub-clause (d), and it seems to me that (d) again, although, perhaps, it is not wholly free from ambiguity, is on its true construction consistent with the view which I have already expressed as to the effect of the

article as a whole. On the whole it seems to me impossible to treat this article as having the effect of turning what is an offer to sell a given number of shares, say 5000 shares, into an offer to sell one share at the price stated for the whole 5000.

For these reasons the plaintiffs are not entitled to succeed on the summons, and it must be dismissed with costs.

Solicitors: *Ingledew, Sons & Brown, for Ingledew & Sons, Cardiff; Slaughter & May.*

E. K. C.

Applied. BANQUE DES MARCHANDS DE MOSCOU v. KINDERSLEY. [1950] 2 All E.R. 549.

[1932] 1 Ch. 663. *In re* RUSSIAN AND ENGLISH BANK.

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Company—Procedure—Russian bank with London branch—Dissolution of bank by Russian law—Petition to wind up London branch as an unregistered company — Jurisdiction — Disputed debt — Remedy — Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 338, sub-s. 1 (d), 2.

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A petition was presented by creditors (whose debt was disputed) for the compulsory winding-up of an unregistered foreign company which had a branch in England and which was dissolved by the laws of Russia before the Companies Act, 1929, came into operation :—

Held, that the provisions of s. 338 of the Companies Act, 1929, notwithstanding sub-s. 2 of that section, did not alter the law as it existed, before that statute came into operation, under the corresponding sections of the Companies Acts of 1862 and 1908, and that the Court had therefore jurisdiction to make an order for the compulsory winding-up of the company under s. 338, sub-s. 1 (d).

In re Family Endowment Society (1870) L. R. 5 Ch. 118 followed.

Held, also, that, notwithstanding the general rule that a disputed debt may not form the basis of a creditor's petition for the winding-up of a company, the petitioners would in the circumstances be otherwise without a remedy and were entitled to proceed by a winding-up petition; and that they were entitled to a compulsory order for the winding-up of the company.

PETITION.

The Russian and English Bank, which was incorporated under the laws of Russia in 1910, and which established a place of business in England in 1915, was dissolved by the

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laws of Russia before the coming into operation of the Companies Act, 1929. In 1927 an action was commenced by the petitioners in the King's Bench Division against the Russian company for the recovery of a sum of 20,000*l.*, which they alleged was due to them. Owing, however, to the dissolution of the company, they were unable to proceed with their action. In *Russian and English Bank v. Baring Brothers & Co., Ltd.* (1), the plaintiff bank was treated as having been dissolved, and as a result of the observations contained in the judgment the petitioners presented a petition for the compulsory winding-up of the company.

The petition was served on the Treasury Solicitor in order that the question whether the Court had jurisdiction to make a compulsory winding-up order might be argued.

Gavin Simonds K.C. and *Harold Christie* for the petitioners. Having regard to the order of the Court in *Russian and English Bank v. Baring Brothers & Co., Ltd.* (1), the company is dissolved, and it does not appear. In view of that decision it was useless for the petitioners to continue their action. They have now no way of asserting their claim except by means of this petition. The Court has jurisdiction under ss. 337 and 338, sub-s. 1 (*d*), to make a compulsory winding-up order on this petition. (2) Sect. 338, sub-s. 1 (*d*), is a

(1) Ante p. 435.

(2) Companies Act, 1929, s. 337 :
"For the purposes of this Part of this Act, the expression 'unregistered company' shall include any trustee savings bank certified under the Trustee Savings Banks Act, 1863, and any partnership, whether limited or not, any association and any company with the following exceptions :—"
[The exceptions are not material to this report.]

Sect. 338 : "(1.) Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to

an unregistered company, with the following exceptions and additions :—

. . . . (*d*) The circumstances in which an unregistered company may be wound up are as follows :—

(i) If the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs ;

(ii) If the company is unable to pay its debts ;

(iii) If the court is of opinion that it is just and equitable that the company should be wound up :

(2.) Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great

verbatim re-enactment of the corresponding section of the Companies (Consolidation) Act, 1908, which re-embodied the corresponding section of the Companies Act, 1862. A meaning was, therefore, given to that sub-section over fifty years ago, and the Court has power to make the order: see *In re Family Endowment Society*. (1) The company was dissolved before the Act of 1929 came into operation. Sect. 338, sub-s. 2, is new legislation and adds nothing to the state of the law. The bank is an unregistered company which has been dissolved under cl. (i) of s. 338, sub-s. 1 (d) (i). The words "is dissolved" in cl. (i) mean "has been dissolved." If there is no jurisdiction to wind up the company and put it under proper control, its assets in this country are bona vacantia and the property of the Crown.

[They also referred to Buckley on the Companies Acts, 11th ed., p. 618, and *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*. (2)]

Lionel Cohen K.C. and *W. Gordon Brown* for the Imperial and Foreign Corporation, Ltd., appearing as creditors in opposition to the petition. These creditors support the contention on behalf of the petitioners as to the jurisdiction, but oppose the petition on the ground that the debt of the petitioners is a disputed debt and that the petitioners are, therefore, not entitled to present a petition for the winding-up of the company. The debt of the Imperial and Foreign Corporation is an admitted debt, and they have presented a second petition. If an order is made on their petition no one will ever dispute the validity of that order. (3)

[They referred to *In re Great Britain Mutual Life Assurance Society*. (4)]

Britain, it may be wound up as an unregistered company under this Part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated."

(1) L. R. 5 Ch. 118, 129, 135.

(4) (1880) 16 Ch. D. 246.

(2) [1925] A. C. 112, 149.

(3) His Lordship dismissed the second petition on the ground that the petitioners therein might, in view of the attitude which they had taken up, have given notice to appear and support the first petition and, if necessary, have asked to be substituted as petitioners.

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Sir Thomas Inskip A.-G. and C. Stafford Crossman for the Crown. The Court has no power to accede to the present petition. The *Mulhouse* case (1) was a decision that the defendants had not shown that the Russian banks had ceased to exist. The subsequent proceedings were conducted on the footing that the banks existed. In *Lazard Brothers v. Banque Industrielle de Moscou* (2) the defendant bank was regarded as a non-existent person. In the present case the Crown has a claim to the goods as bona vacantia if it is able to obtain possession of them.

With regard to s. 338, sub-s. 2, that sub-section, contrary to the contention on behalf of the petitioners that it means nothing, has a definite meaning. The word "ceases" cannot refer to anything except the future, and sub-s. 2 only applies when dissolution is in futuro: that is to say, if a company has ceased to exist it cannot be wound up, but if in future it ceases to exist it can be wound up. The sub-section was put into the statute as an addition with a purpose. If the words are read with their natural meaning they mean that when a company such as this Russian company ceases to carry on business in Great Britain, it may be wound up under this Part of the Act, and it may be so wound up in spite of the fact that it has been dissolved as a company under the laws of Russia, where it has been incorporated. In *In re Wells* (3) Farwell J. treated the words "is dissolved" as meaning "is" and not "has been" dissolved.

Another ground for suggesting that this is not a proper case for the exercise of the jurisdiction of the Court, is that a petition of this kind must be presented by a creditor. If a company is non-existent there can be no creditors on whose petition there could be a winding-up.

Gavin Simonds K.C. in reply. The status of foreign companies of this kind is discussed in *In re Matheson Brothers, Ltd.* (4) The following appears to be reason for the insertion of sub-s. 2. The case of the Russian banks was one of considerable difficulty. In 1925 they had been held by the

(1) [1925] A. C. 112.

(2) [1932] 1 K. B. 617.

(3) Ante p. 380.

(4) (1884) 27 Ch. D. 225.

House of Lords not to have been dissolved. That was the state of the law until 1929. Sub-s. 2 was intended to cover a case in which it might or might not be established that a company had or had not been dissolved.

[He referred to *Employers' Liability Assurance Corporation, Ltd. v. Sedgwick, Collins & Co., Ltd.* (1), and *Banque Internationale de Commerce de Petrograd v. Goukassow.* (2)]

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BENNETT J. This petition for the winding-up of the Russian and English Bank was presented by three persons claiming to be creditors for the sum of 20,000*l.* The petition was, by the direction of the Registrar, served on the Treasury Solicitor, who appeared for the purpose of raising before the Court the question whether there is jurisdiction to wind up the company, having regard to the facts of the case and to the provisions of ss. 337 and 338 of the Companies Act, 1929.

The company was incorporated under the laws of Russia in the year 1910, long before the outbreak of the Great War, and it is now admitted by the Attorney-General on behalf of the Treasury Solicitor that the company has been dissolved, and it is admitted by Mr. Gavin Simonds on behalf of the petitioners that the company was dissolved before November 1, 1929, the date on which the Act of 1929 came into operation. These admissions have been made because of the recent decision of Eve J. in *Russian and English Bank v. Baring Brothers & Co., Ltd.* (3), a decision which was arrived at upon evidence that by the law of Russia the company was dissolved. It is upon those facts and upon the language of the above mentioned sections of the Act of 1929 that the question of jurisdiction arises.

These sections are placed in Part X. of the Act which contains provisions for the winding-up of unregistered companies. Sect. 337 provides that "for the purposes of this Part of this Act, the expression 'unregistered company' shall include

(1) [1927] A. C. 95, 108.

(2) [1923] 2 K. B. 682, 691.

(3) Ante p. 435.

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any trustee savings bank certified under the Trustee Savings Banks Act, 1863, and any partnership, whether limited or not, any association and any company with the following exceptions"; and then there follow certain exceptions which do not include such a company as the Russian and English Bank. Sect. 338, sub-s. 1, provides that: "Subject to the provisions of this Part of this Act, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company," with certain exceptions and additions which are not material. By para. (d) it is provided as follows: [His Lordship read para. (d):] So far the provisions in s. 338 are a reproduction of the provisions which were contained first in the Companies Act, 1862, and then, when that Act was repealed and the law was consolidated, were re-enacted in the Companies (Consolidation) Act of 1908. But in the Act of 1929 there was added the provision contained in sub-s. 2, which is new legislation and is in these terms: [His Lordship read the sub-section and continued:]

The question is whether, having regard to the provisions of that sub-section, a company which has been dissolved before November 1, 1929, when s. 338 came into force, can be wound up under the jurisdiction of the section—that is to say, whether the section as a whole has any retrospective operation.

Now it is established by the case of *In re Matheson Brothers, Ltd.* (1), that a company which owes its existence to foreign law is an unregistered company within the meaning of s. 338. It had been decided before 1929 that an unregistered company might be wound up under the Act of 1862, the material section of which is replaced by s. 338, sub-s. 1 (d), of the Act of 1929, although the company had been dissolved before the Act came into operation. In other words, it had been decided on the language of the relevant section of the Act of 1862 that the words "is

dissolved" were equivalent to the words "has been dissolved." That was decided by the Court of Appeal in *In re Family Endowment Society*. (1) The question, therefore, depends upon this—namely, whether in 1929, when sub-s. 2 was added to s. 338, it was a piece of new legislation which was meant to alter that which, down to that date, had been judicially decided to be the meaning of the language which is now used in sub-s. 1 (*d*) of s. 338.

In considering what was the intention of Parliament it seems to me material to consider what course the Courts of this country had adopted shortly before the Act of 1929 came into operation, with regard to the position of Russian corporations (i.e., corporations, incorporated in accordance with the law of Russia, trading in this country), under the various decrees made by the Russian Government. This attitude is well expressed in a passage in the speech of Lord Sumner in *Employers' Liability Assurance Corporation v. Sedgwick, Collins & Co., Ltd.* (2), where his Lordship is reported as follows: "Your Lordships decided last year that the decrees of the Soviet Government of Russia, which then were textually before you, did not in the case of banking companies dissolve the companies themselves, but only stripped them of their assets and destroyed their goodwill by making banking a state monopoly, while at the same time they deprived the shareholders of their shares. In these decrees not only the word 'dissolution,' but the thing itself was carefully avoided."

Mr. Gavin Simonds suggested, and I think rightly, that sub-s. 2 of s. 338 was added to the old law on the subject (which the section otherwise re-embodied), because of difficulties which had arisen in dealing in this country with corporations which owed their existence to the law of Russia, and if that be the reason, as I think it was, for the insertion of sub-s. 2, the Legislature did not, in my judgment, in 1929, intend to alter the law as it had existed under the Acts of 1862 and 1908.

(1) L. R. 5 Ch. 118, 136.

(2) [1927] A. C. 95, 108.

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In my judgment, therefore, although the company was dissolved before November 1, 1929, there is jurisdiction to wind it up under the provisions of s. 338, sub-s. 1 (d) (i).

A second objection is, however, raised by the Imperial and Foreign Corporation, Ltd., who in their capacity of creditors oppose the petition, their opposition being based on an allegation that the petitioning creditors' debt is a disputed debt and therefore cannot be made the foundation of a petition. There are no doubt strong grounds for challenging the petitioners' debt, and it is abundantly clear that it is a disputed debt.

There is no doubt as to the general rule that a disputed debt may not be the basis of a creditors' petition, but the position of the petitioners in question is a singular one. They brought their action in 1927 for the purpose of establishing their debt, but having regard to the decision in *Russian and English Bank v. Baring Brothers & Co., Ltd.* (1) that the Russian and English Bank have no longer any existence, it is not possible for them to proceed with that action. In these circumstances they will be without a remedy unless they can proceed by way of a winding-up petition. The mere fact that there is an order on the petition will not establish that they are creditors of the company. It will be the duty of the liquidator to find out the rights of the petitioning creditors, and if necessary to reject their claim. It does not seem to me that the general rule against a disputed debt being used as the foundation of a winding-up petition should be applied in the present case, where the persons whose debt is disputed would otherwise be without redress.

In these circumstances, as no possible harm can be done to anybody by a winding-up order being made, and as the creditors who oppose the winding-up on this petition are themselves desirous that the company should be wound up, I overrule their objection and make an order on this petition for the compulsory winding-up of the company. The costs

(1) Ante p. 435.

of the Attorney-General, who has appeared as a respondent to the petition in order to assist the Court, will be paid out of the assets.

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Solicitors: *Herbert Oppenheimer, Nathan & Vandyk; Treasury Solicitor; F. M. Guedalla & Co.; Maxwell, Batley & Co.*

J. L. D.

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